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**Access to Marriage for Same-Sex Couples
in New Zealand:
A Matter of Human Rights**

**A thesis
submitted in fulfilment
of the requirements for the degree
of
Doctor of Philosophy in Laws
at
The University of Waikato
by
NIGEL CHRISTIE**

**The University of Waikato
2009**

“Torch Song Trilogy”Harvey Fierstein ¹

- Ma: *What are you doing?*
- Arnold: *I'm doing the same thing you're doing.*
- Ma: *No! I'm reciting Kaddish for my husband. You're blaspheming your religion.*
- Arnold: *Ma. Do you know who this is? This is my lover.*
- Ma: *Wait! Wait! Wait! Wait! Wait! Are you trying to compare my marriage with you and Alan? Your Father and I were married for thirty-five years, had two children and a wonderful life together. You dare compare yourself to that?*
- Arnold: *That's not what I mean. I'm talking about the loss.*
- Ma: *What loss did you have? You fooled around with some boy. Huh? Where do you come to compare that with a marriage of thirty-five years? Come on, Arnold. This isn't one of your pals you're talking to.*
- Arnold: *Ma, I lost someone I loved very much.*
- Ma: *So you felt bad. Maybe you even cried a little. But what would you know about how I felt? Thirty-five years I lived with this man. He got sick, I brought him to the hospital, and do you know what they gave me back? I gave them a man ... They gave me a paper bag with his watch, wallet, and wedding ring. They gave me a place to visit High Holy days. Hmmm! How could you possibly know how I felt? It took me two months before I could sleep in our bed alone, and a year, it took me a year before I could say "I" instead of "we". Ha? And you're gonna tell me you are "mourning". How dare you?*
- Arnold: *You're right, Ma. How dare I? I couldn't possibly know how it feels to take somebody's things, put them in plastic bags, and watch garbage men take them away. Or how it feels when you forget and you set him his place at the table. How about the food that rots in the refrigerator 'cause you forgot how to shop for one? How dare I, right Ma? How dare ...? Believe me Ma, you had it easy. You have thirty-five years to remember. I have five. You had your children and your friends to comfort you. I had me! My friends didn't want to hear about it. They said, "What're you gripin' about? At least you had a lover". That's right, Ma. You had it easy. You lost your husband in a nice clean hospital. You know where I lost mine? I lost mine on the street. That's right, Ma. They killed him on the street. Twenty-seven years old, lying dead on the street. Killed by a bunch of kids with baseball bats. That's right, Ma! Killed by children! Children taught by people like you. 'Cause everybody knows that queers don't matter. Queers don't love. And, those that do, deserve what they get!*

¹ Fierstein, H., *Torch Song Trilogy*, Villard Books, New York (1983), 145-6.

ABSTRACT

Scope of work undertaken

This thesis focuses on access to marriage as a fundamental human right, and the premise that there is no justifiable reason, in terms of New Zealand law, why same-sex couples should be excluded from this right.

Method of investigation

This thesis is the result of participatory action research and academic analysis.

I have been centrally involved with the issue of equal access to same-sex marriage and, therefore, this thesis has been an experiential exercise involving engagement with key protagonists in human rights issues in New Zealand – proponents and detractors.

However, I have also considered a great deal of primary and secondary material, particularly in relation to human rights law and family law, and have considered key developments regarding relationship recognition in a range of overseas jurisdictions.

Main divisions of the thesis

Part I provides introductory information, setting the objectives and the parameters of the thesis. This part also includes the methodology used in the gathering and analysis of information in the writing of this thesis.

In Part II, I provide a range of information to set the context in which I have considered the issue of same-sex marriage. This includes a personal perspective, an analysis of the human rights imperatives, and a commentary on a range of issues relating to New Zealand's constitutional and social arrangements.

In Part III, I consider developments in the law in New Zealand and overseas. I examine the response of the New Zealand courts, the United Nations Human Rights Committee, and the Government and Parliament of New Zealand to the call for same-sex marriage in New Zealand. I also examine legislative initiatives and court challenges in a range of overseas jurisdictions and the extent to which these have been successful in providing equal access to marriage for same-sex couples and the impact these might have on future developments in New Zealand.

Finally, Part IV provides a summary of the key themes of the thesis, a consideration of options for possible future action, and suggestions with regard to ensuring future success.

Conclusions reached

My conclusion is that there is no valid justification for denying full marriage equality to same-sex couples in New Zealand, and that there are steps that we can take to ensure the achievement of full and equal treatment under the law.

It is my thesis that there is no valid justification for denying full marriage equality to same-sex couples in New Zealand.

Contribution to knowledge of the subject

This thesis provides a comprehensive analysis of law and historical fact relating to the recognition of lesbian and gay relationships in New Zealand, and in that sense, provides a cultural and historical tool for immediate use.

The thesis also, however, provides a platform for future progress. I consider that it will be able to be used as a reference to shift attitudes.

Much of the material in this thesis has been used already, both in New Zealand and internationally, in helping to bring about change.

FOREWORD

In our opinion, this thesis is the most comprehensive analysis of history and facts relating to the recognition of lesbian and gay relationships in Aotearoa/New Zealand that has ever been compiled.

This living document provides a cultural and historical tool for now, and in the future, as a poignant reference to put facts in place over myth and homophobic prejudice.

This work provides a valuable contribution to make a difference for our community over time to come, and already has in terms of the research, analysis, representation and speaking on the issue that Nigel has done during the time of writing his thesis.

We are very proud to have Nigel as a friend and supporter throughout the time we struggled to achieve recognition of our marriage. We have experienced Nigel as a man of complete integrity and passion, who has worked tirelessly to present the true reality of equality in the context of recognition of lesbian and gay relationships in New Zealand.

The truth is that as lesbians and gays in this country we already play our part in making our society and respective communities function in a respectful and structured way. We contribute in a society that professes equal opportunity for all its citizens, but chooses to discriminate against our community, putting rules and policies in place that bring a perception that blinds the reality that we are still second class citizens.

The truth is that we are all human beings and are entitled to expect no less than to be afforded the same protections, responsibilities and consequences as anyone else in our society.

The truth is that our Parliament must at some point be called to account for the injustice it has bestowed on us through creating the Civil Union Act as a compromise semblance of 'equality'.

The truth is that we are all wonderfully different individuals, alongside all the other wonderfully different non-gay individuals in this country, and we should all have the same rights and status under our law.

Nigel has dedicated his time and energy to search out and present these truths as an undeniably real and justified case for the right to complete equality for all lesbian and gay couples who seek recognition of their relationships in marriage. This work will add to the rich conversations, the high quality sources of research and the personal stories of our lesbian and gay history and culture here in Aotearoa/New Zealand, and we believe form a significant contribution to the achievement of a just and equal society for all.

Thank you, and well done Nigel.

Jenny Rowan and Jools Joslin

3 September 2009

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Part I

INTRODUCTORY MATERIAL

For me, this thesis is far more than an academic exercise conducted merely for the sake of completing the requirements for a postgraduate degree qualification in law. This work is the record of a personal journey that I have undertaken in the company of others, including the following:

- My partner, who has endured the many hours of my absence and the on-going saga of “the thesis”. In addition, he and I have discussed the possibility of celebrating our relationship in some way and, with me he has made the commitment that we will marry in New Zealand when the law permits us to do so. We will not accept a civil union in New Zealand, and we will not marry overseas. We will marry in the country of our birth and citizenship.
- Our son, who my partner and I welcomed into our family almost three years ago. His presence in our lives has resulted from us challenging the status quo to enable us all to live our dream. His presence in our lives has served to cement our commitment to our equality ideal.
- Same-sex couples for whom the goal of full equality under the law for their relationships is a reality worth fighting for, and for whom anything less will not be sufficient. I have worked very closely with them and I value their absolute support over a considerable period of time.
- In addition, there have been many others for whom this issue brings no personal advantage, but who are committed to equality under the law, the elimination of discrimination and, above all, the fundamental notion of the dignity of, and respect for, others.

The purpose of Part 1

To set the scene for this journey, the first Part of my thesis provides an introduction and the methodology to enable the substantive material supporting my fundamental thesis to be presented in a clear and meaningful way.

The Introduction, in Chapter 1, provides my thesis statement and the over-all objective of the thesis.

This is followed by an outlined of the parameters of the thesis – some introductory comments, additional to those contained in the Preface, that give the perspective from which I approach the topic of same-sex marriage. I also outline my reasons for including or excluding certain categories of material.

I then outline the general format of this thesis, summarising the stages through which it passes and the ground it covers.

In Chapter 2, the Methodology, I show how this thesis has been not only an academic exercise, keeping abreast of developments in thinking and law from throughout the world, but how this has also been very much an experiential exercise. A key component of this thesis has been engaging in dialogue with key protagonists in the advancement of human rights issues in New Zealand – not only those in favour of enhanced and enlivened human rights for all, but also the detractors.

I am convinced that my fundamental thesis is correct. Furthermore, I am convinced, that by the time you have read the following evidence, you will agree.

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THESIS STATEMENT

It is my thesis that there is no valid justification for denying full marriage equality to same-sex couples in New Zealand.

It is my submission that the current denial of access to marriage by same-sex couples results from a questionable application of New Zealand human rights laws and does not constitute a valid limitation on the rights of same-sex couples. I therefore submit that, in the face of the provisions of the New Zealand Bill of Rights Act s.5, the current denial constitutes:

- an **un**reasonable limitation on the rights of same-sex couples; and
- is **not** based upon demonstrable justification.

OBJECTIVE

The over-all objective of this thesis is to show that same-sex couples in New Zealand can reasonably expect that they should have access to civil-legal marriage in the same way, and on the precisely the same terms, as different-sex couples. There is no suggestion that same-sex couples are seeking special rights. Rather, by seeking access to the recognition of relationships through civil-legal marriage, same-sex couples are seeking equal treatment before and under the law.

In specific terms, the aims of this thesis are several-fold. It will demonstrate that same-sex couples can reasonably claim a right to recognition of their relationships through civil-legal marriage on the basis that:

- access to relationship recognition through marriage is a basic civil right;
- New Zealand's domestic human rights legislation prohibits discrimination on the ground of sexual orientation;
- international human rights standards prohibit discrimination on the ground of sexual orientation;

- many of the current objections to same-sex marriage lack valid and reasoned foundation;
- with the increasing extension to same-sex couples of entitlements under New Zealand law, exclusion from civil-legal marriage becomes increasingly illogical; and
- with increasing access to civil-legal marriage for same-sex couples in overseas jurisdictions, exclusion in the New Zealand setting is becomes increasingly untenable.

The thesis statement and the title of this thesis also reflect my strong personal conviction in relation to the human rights imperatives of equality before the law and of respect for the dignity of the person. It is this personal conviction which led me to begin researching this area in depth.

Furthermore, my involvement in the Quilter same-sex marriage case,¹ and a range of other issues relating to the treatment of same-sex couples, and my examination of this issue at an academic level, have strengthened this conviction and my commitment to a principled approach to the right of same-sex couples to marry. This resolve has been strengthened further by the wider examination of developments in the legal recognition of same-sex relationships in overseas jurisdictions.

PERSONAL STATEMENT

Essentially, the fundamental issues that will be explored in this thesis are associated with equal treatment before and under the law for same-sex couples with regard to:

- status – same-sex couples being able to access the same civil-legal relationship status as different-sex couples;
- choice – same-sex couples being able to access the same range of choices with regard to relationship recognition that can be accessed by different-sex couples; and

¹ Quilter v Attorney-General [1998] 1 NZLR 523.

- entitlements – same-sex couples being able to access exactly the same relationship benefits, protections, and obligations that can be accessed by different-sex couples.

Marriage is a fundamental social institution, entry into which is seen by most New Zealanders as a natural part of the way their life progresses. Marriage, amongst New Zealanders generally, is not seen as a privilege, but rather as a right – a stance that is recognised and supported at a judicial level:²

... [the] freedom to marry is rightly regarded as a basic civil right.

In accord with New Zealand human rights legislation, it is arguable that, if marriage is a basic civil right that is extended to different-sex couples, then, in reliance upon the prohibitions against discrimination on the ground of sexual orientation in the New Zealand Bill of Rights Act 1990 s.19, marriage is a basic civil right that should be extended also to same-sex couples. To quote Thomas J more fully:³

Based upon this personal characteristic, gays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. In a real sense, gays and lesbians are effectively excluded from full membership of society.

As the State incrementally extends the number of statutory provisions that include same-sex couples (and de facto different-sex couples), it is possible to argue that these couples are being provided for in a way that does not undermine traditional marriage, and that marriage should be 'left alone'. However, I do not adhere to the argument that, the ability of same-sex couples to access, by alternative statutory means, an increasing number of the specific entitlements that flow from marriage, derogates from the argument that same-sex couples should be permitted to marry.

² Quilter v Attorney-General [1998] 1 NZLR 523: 537.

³ Quilter v Attorney-General [1998] 1 NZLR 523: 537.

However, it is the very concept of these being ‘alternative’ arrangements that is the key concern. It is not the formal legal entitlements alone that are important. Rather, as addressed in this thesis, it is the issue of equality that is fundamental, and the ability of same-sex couples to access marriage as a means of formalising their relationship in the same way that different-sex couples can access marriage to formalise their relationships. What is being sought is equality in terms of the status that marriage attracts in the eyes of society at large. One of the important aspects of marriage is that it is a recognised and respected social institution that brings with it an (often unspoken) acknowledgement of the intangibles of a relationship, and an acknowledgement of the assumed value and validity of the relationship.

The marriages of different-sex couples, and families based on the heterosexual ideology, **are** privileged by the law. Such relationships are established as the norm by those who seek to perpetuate this privilege, and relationships that are different are consequently portrayed by them as abnormal, or at least inferior.

For this reason, those in decision-making positions actively seek ways of providing recognition to these different forms of relationships – without providing access to marriage. To date, the most usual response has been to provide legal recognition of same-sex relationships by way of registered partnerships.⁴ However, it is my view that registered partnerships fail in that they offer to same-sex couples neither legal nor social equality with different-sex couples. What registered partnerships do offer is a legal compromise and the positioning of gays as second-class citizens.

Offering ‘alternatives’ such as increased entitlements to partners in de facto relationships or through providing for registered partnerships does not provide for full and equal treatment before the law. In my view:

- there can be no such thing as “degrees of equality”;⁵

⁴ Here, and throughout this thesis I will use the term ‘registered partnerships’ to include civil unions and other similar models (as in the Vermont and French models, and the model adopted in New Zealand), but not lesser forms of partnership recognition. (See more detailed discussion on this point later in this chapter).

⁵ See the Human Rights Commission submission to the Ministry of Justice on the Ministry’s Discussion Paper on “Same-Sex Couples and the Law” (April 2000).

- equality under the law is a destination rather than a journey; and
- incrementalism is not part of the language of (civil and political) human rights.

It is the principle of equality that is fundamental to this thesis. Although the discussion moves in and out of areas such as family law, and culture and tradition, it will be directed predominantly towards the issue of access to marriage by same-sex couples on the basis of human rights imperatives.

THE PARAMETERS OF THIS THESIS

Timeframes

The writing of this thesis commenced in 1994 as a Masters in Jurisprudence at the University of Waikato. My interest in this topic was sparked jointly by:

- my interest in family and human rights laws; and
- the fact that the same-sex marriage case, Baehr v Lewin,⁶ was progressing through the courts of the State of Hawai'i in the United States of America.

Although the ultimate outcome of Baehr was a denial of access to marriage for same-sex couples, I found the presentation of the cases in court and the associated public debates were fascinating. There had been earlier cases,⁷ but still by 1994 access to marriage for same-sex couples was a somewhat distant hope, and Baehr fuelled some of that hope.

In retrospect, we can now say that it would be a further 7 years before any jurisdiction in the world extended equal marriage rights to same-sex couples – in The Netherlands in 2001. However, the first Baehr case

⁶ Baehr v Lewin 852 P.2d 44 (Haw. 1993). Note that the 'Baehr case' was, in the final analysis, a series of cases (four in all) with the original case in the Circuit (Trial) Court going to appeal, being referred back to the trial court, and then to the State Supreme Court for a final decision, and subsequent stay of proceedings pending Constitutional referendum. See discussion on this (and the subsequent cases) in Chapters 6 and 7.

prompted further legal action in, for example, Alaska and Vermont in the United States of America, and arguably in other national jurisdictions also such as New Zealand. Following on from the Baehr cases, and in particular since the 2001 legislative breakthrough in The Netherlands, there has been a significant increase in activity with regard to advocacy through court cases and the lobbying of legislatures with the objective of seeking access to marriage for same-sex couples.

At the time of final submission of this thesis, there are 7 national jurisdictions (countries), plus 6 states within the United States of America, that offer same-sex couples access to recognition of their relationships by marriage in exactly the same way as for different-sex couples:⁸

- Canada – 14 January 2001 ⁹
- The Netherlands – 1 April 2001
- Belgium – 1 June 2003
- Massachusetts, USA – 17 May 2004
- Spain - 19 June 2005
- South Africa - 30 November 2006
- Connecticut, USA – 28 October 2008
- Norway - 1 January 2009
- Sweden – 1 May 2009
- Iowa, USA – 27 April 2009
- Vermont, USA – 1 September 2009
- Maine, USA – 14 September 2009
- New Hampshire, USA – 1 January 2010

⁷ See discussion in Chapter 6 about early cases.

⁸ Note that the dates given are not the dates of the court decision or passage of legislation, but the dates on which the decision or the legislation took effect. Note also, that seven of these have come into effect or have been approved after the ‘cut-off’ point for this thesis. Brief comment on these cases appears in Chapter 9 only.

⁹ In Canada on 10 June 2003, the Supreme Court of Ontario, in Halpern v Canada (2003) 65 O.R. (3d) 161, issued a decision which validated the marriages that had

Additionally, there have been further attempts in other jurisdictions, through courts or by way of legislative change, to achieve legal recognition of same-sex relationships by access to marriage. However, not all attempts have been successful – an example of this being the Quilter same-sex marriage case here in New Zealand.¹⁰

In some instances, the recognition sought by way of marriage has been ‘replaced’ with recognition by way of one or other of the myriad of forms of registered partnership regimes, or by way of the extension of individual legal entitlements that are available to unmarried different-sex and same-sex couples.

There are significant practical issues associated with writing a thesis on a topic where there is such a steady development of the issues, whether successful or unsuccessful, and where there is such a level of change whether negative or positive.

The key difficulty arising from the constant development and change is the purely practical difficulty with regard to keeping all aspects of the thesis up-to-date. There have been several occasions where the writing of the thesis has been all but complete and then there have been major developments in one jurisdiction, or announcements with regard to a significant court case in another.

However, for this reason, I have decided to set a formal cut-off date, for the period of consideration in this thesis, as at 31 December 2006.

This means that, with regard to developments here in New Zealand, I have covered the period up to and including the passage and implementation of the Civil Union Act 2004 and the Relationships (Statutory References) Bill 2005.¹¹

With regard to developments overseas, this covers the period beyond the advent of marriage for same-sex couples in Canada, The Netherlands, Belgium, Massachusetts, Spain and South Africa; as well as some consideration of a range of jurisdictions that, during the same time period, opted for registered partnership or civil union regimes.

been solemnised on 14 January 2001. Retrospectively, therefore, these marriages became the world’s first modern legally-recognised same-sex marriages.

¹⁰ Quilter v Attorney-General [1998] 1 NZLR 523.

It is difficult, when some events have occurred in the past, but are still in effect or impact on the present, to ensure that all information is presented in the proper time context. However, I have endeavoured as much as possible throughout the thesis, to present information from a consistent perspective with regard to sequencing.

I am aware also that this means that some matters do not receive detailed consideration and analysis in this thesis. However, Chapter 9 will provide some introductory information about:

- the arrival of same-sex marriage in Connecticut, Norway, Sweden, Iowa, Vermont, Maine, and New Hampshire; and
- the advent and subsequent removal of access to marriage for same-sex couples in California, and the ongoing legal action in that jurisdiction.

It is intended that Chapter 9 will act solely as a brief post-script in order to provide a summary of the relevant events and what those events might mean for the pursuit of access to marriage for same-sex couples in New Zealand.

Different approach from that in the Quilter case

When the issue of same-sex marriage was placed before the courts in New Zealand in April 1996 (High Court) and December 1997 (Court of Appeal),¹² the respondents / appellants were seeking a declaration that same-sex couples must be permitted to marry under the existing Marriage Act 1955.

The opening line of the Court of Appeal judgement states:¹³

The issue in this case was whether the Marriage Act 1955 allowed for marriages between persons of the same sex.

¹¹ See discussion on the passage of these statutes in Chapter 8.

¹² Quilter v Attorney-General (1996) 14 FRNZ 430 and Quilter v Attorney-General [1998] 1 NZLR 523, respectively.

¹³ Quilter v Attorney-General [1998] 1 NZLR 523: 523.

In essence, the argument was that the Marriage Act 1955 is gender-neutral and that the Act could be, and must be, interpreted to include same-sex couples. In this respect, the issue before the Court was not whether or not the exclusion of same-sex couples from marriage was (and is) discriminatory, but rather whether the existing Marriage Act 1955 could be interpreted so as to enable same-sex couples to marry under that Act.

The Court of Appeal held that the meaning of marriage in New Zealand, as intended by Parliament when it passed the Marriage Act 1955, was clear. The Court upheld the traditional meaning of marriage in New Zealand as being the “voluntary union for life of one man and one woman to the exclusion of all others”. Essentially, the Court, in its majority, said that regardless of whether or not the denial of access to marriage was discriminatory:

- it was not possible to interpret the Marriage Act 1955 in a manner that would permit same-sex couples to marry; and
- any change to the Marriage Act 1955 to enable same-sex couples to marry would have to be made by Parliament.

This thesis does not focus on that same definitional issue. Rather, this thesis focuses on the issue of equality and shows that, under current New Zealand law:

- the denial of access to marriage by same-sex couples constitutes different treatment for same-sex couples as compared with different-sex couples based on gender and sexual orientation;
- this different treatment is not demonstrably justifiable in New Zealand law and therefore constitutes discrimination; and
- in order to comply with New Zealand’s human rights imperatives, the law must be changed to permit access to marriage by same-sex couples.

A Gay Male Perspective

For the purposes of this thesis, it is important to clarify that I do not consider myself qualified to discuss the issue of same-sex marriage from

other than a gay male perspective. While I may make reference to lesbian writings and the views of lesbian women, I use these in the broader context of same-sex marriage and not in the context of a discussion about lesbianism per se. Similarly, I will draw on information arising from experiences of transgender persons, but this is not a discussion about transgenderism. This thesis is about the issue of same-sex marriage.

Sexual Orientation and Gender: A Clarification of Terms

It is important in this discussion to clarify the distinction between issues of sexual orientation and issues of gender. Both sexual orientation and sex (gender) are enumerated grounds on which discrimination is prohibited in the Human Rights Act 1993 s.21. They are separate grounds and, while there is some philosophical overlap, they are generally intended to deal with separate issues.

There still appears to be a view amongst many people in wider society, including some of the members of our House of Representatives, that being a homosexual person is the first step along a continuum towards being transvestite and then transsexual.¹⁴ In fact, these are three distinct categories of individuals.

Some of the confusion which has arisen in relation to the above distinct identities may stem from a term which has been used in recent times. The term “queer” has been used as a generic term for all of the above groups. It is a term with political origins used in an attempt to embrace the various types of alternative identity,¹⁵ relating to sexual orientation on the one hand, and gender on the other. As a generic term, it includes gay, lesbian, bisexual, transvestite and transsexual.

¹⁴ A view expressed often by, for example, John Banks during his time as a Member of Parliament, and as a Minister of the Crown, and as a host on radio talkback, and as Mayor of Auckland City.

¹⁵ That is, an alternative to the hegemonic norm – namely, an alternative to the male who identifies as male and is attracted to females, or the female who identifies as female and is attracted to males.

However, each of these groups is distinct and each person within each group has the right to define their own identity without this definition being obscured by being merged into a generic whole. Further, each person and each group has a right to choose to be free from the derisiveness that the term 'queer' can attract when used by those who seek to attach to it the connotations of stigma and judgement.

Homosexuality (or being gay or lesbian) is a matter of sexual orientation, not of gender.¹⁶ For example:

- A male homosexual is a person who identifies as a male, and is emotionally and physically attracted, exclusively or predominantly, to other males. It is the attraction to males which is his sexual orientation.
- A female homosexual (lesbian) is a person who identifies as female and who is emotionally and physically attracted, exclusively or predominantly, to other females. It is the attraction to females which is her sexual orientation.
- The attraction of a man or a woman to persons of the opposite gender is the manifestation of their heterosexual orientation.

Conversely, transvestism and transsexualism are gender issues.

- A male transvestite is a person who identifies as a male but who experiences a desire to dress as a woman. In addition to identifying as a male, a male transvestite may be either homosexually or heterosexually oriented. That is, in addition to his or her gender identity, a transvestite's orientation may also be either heterosexual or homosexual.
- A male-to-female transsexual is a person who is born physically of one gender (male) but whose gender identity is that of another (female).

¹⁶ The term homosexuality has tended to be misleadingly defined in terms of the sexual behaviour of an individual rather than the relationship with another person. That is, a homosexual male is defined as a person who seeks sexual contact with other men. In reality, a homosexual male is a person who is attracted to a person of the same gender on a range of levels – emotional, physical, psychological, personal, and sexual.

Issues arising in relation to transvestism, or transsexualism will only be considered in this thesis in so far as they relate to, and impact upon, the issue of same-sex marriage. The discussion surrounding transsexualism and the law, for example, has important implications for the evolving definition of family and in the recognition of non-traditional relationships.¹⁷

The Marriage Debate Amongst Gays

As stated, this thesis is about access to marriage by same-sex couples. I am aware that, whether or not marriage is the ideal form of relationship recognition has been the subject of some debate within the gay and lesbian communities.

First, for example, there has been debate amongst gays and lesbians themselves as to whether they see marriage as a desirable institution to which they want access, or whether they see it as a patriarchal and anachronistic institution of which they want no part. This thesis will show that this is an irrelevant consideration.

Second, there is the issue of whether or not there is sufficient demand amongst gays and lesbians for access to marriage, or whether or not access to equality should be premised on the level of demand. This thesis will show that, on the basis of equal treatment before and under the law, this is also an irrelevant consideration.

The fundamental premise of this thesis, in relation to both these considerations is that, on the basis of equal treatment before and under the law, so long as marriage is available as a form of relationship recognition, access to this should be available to same-sex couples.

Throughout the period during which the issue of same-sex marriage has been under serious consideration in New Zealand, there has been a significant level of agreement amongst gay and lesbian communities that marriage must be available for those same-sex couples who want it. This agreement is supported, and this support has been expressed quite

¹⁷ For example, see the transsexual marriage case: Attorney-General v Family Court at Otahuhu (1994) 12 FRNZ 643; [1995] NZFLR 57 (HC).

strongly, by those who would not wish to avail themselves of the ability to marry even if it should become available to them.¹⁸

The gay and lesbian community has also demonstrated a strong commitment to equal treatment without compromise in other issues relating to equality in the treatment of gays and lesbians. This was the case, for example, when:

- only an equal age of consent of 16 for consensual adult sexual activity was acceptable at the time of homosexual law reform;¹⁹ and
- it was seen as unacceptable for there to be exemptions for the Armed Services and the New Zealand Police Force with regard to the inclusion of prohibitions against discrimination in the Human Rights Act 1993.²⁰

To incorporate lesser standards and expectations into our laws with regard to the treatment of gays and lesbians solely on the basis of sexual orientation is to suggest that gays and lesbians are less valued, and gay and lesbian relationships are less valid, than others in our society.

The specific issues outlined above will surface during the course of the discussion about access to marriage, however, it is not intended necessarily that these will form a specific and detailed discussion in their own right.

The key issue is whether same-sex couples who wish to have their relationships recognised through civil-legal marriage should have access to marriage in exactly the same way that different-sex couples can choose to have their relationships recognised.

Discrimination vis-à-vis Different Treatment

I note that some commentators use the term ‘discrimination’ in the same way as others use the term ‘different treatment’. They then open up to

¹⁸ For example, Alison Laurie (formerly of an anti-marriage lesbian group “Dykes Who Don’t Want A Bar Of It”), in her oral submission to the Justice and Electoral Select Committee on the Property (Relationships) Act 2001, supported access to marriage for same-sex couples who wish to marry.

¹⁹ See further discussion in Chapter 6 with regard to several proposals for decriminalisation with unequal ages of consent.

²⁰ See discussion on this point also in Chapter 6.

themselves the possibility of talking about justified (lawful) discrimination and unjustified (unlawful) discrimination. The New Zealand Human Rights Commission, for example, defines the term ‘unlawful discrimination’ as follows:²¹

Unlawful discrimination occurs when a person is treated less favourably than another person in the same, or similar, circumstances. Discrimination may be unlawful if it is based on one or more of the following grounds ... [the grounds prescribed in the Human Rights Act 1993 s.21 are listed].

I do not adhere to this use of the terminology, and I consider the term ‘lawful discrimination’ to be oxymoronic.

The New Zealand Bill of Rights Act 1990 s.5 sets the standard for discrimination in New Zealand and provides that:

Subject to section 4, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

In this thesis, therefore, I employ terminology essentially as follows:

- less favourable different treatment that is justified, in terms of the requirements of the New Zealand Bill of Rights Act 1990 s.5, constitutes ‘different treatment’ – acceptable under New Zealand law;
- less favourable different treatment that is not justified, in terms of the requirements of the New Zealand Bill of Rights Act 1990 s.5, constitutes ‘discrimination’ – not acceptable under New Zealand law.

Marriage vis-à-vis other forms of relationship recognition

In this thesis I focus, in the main, on access to same-sex marriage as a matter of human rights equality. It is necessary, therefore, to compare marriage with other forms of relationship recognition.

²¹ Human Rights Commission, “Fact Sheet #04”:
http://www.hrc.co.nz/hrc_new/hrc/cms/files/documents/09-May-2008_13-19-52_Factsheet_01_Welcome.doc (Retrieved: 6 July 2009).

There are, in my analysis, three broad categories of relationship recognition regimes available. These can be listed as:

- marriage;
- registered partnerships; and
- other forms of recognition.

Marriage

For the purposes of this thesis, marriage means civil-legal marriage as provided for in marriage legislation of most jurisdictions.²²

Registered partnerships

There is a range of terminology used to describe very similar regimes, including, for example, Registered Partnerships (Denmark), Civil Solidarity Pacts (France), Life Partnerships (Germany), Civil Unions (New Zealand, Vermont), Civil Partnerships (United Kingdom), amongst others. However, to a greater or lesser degree, each of these can be described as opt-in statutory regimes designed to emulate marriage by way of providing many or most of the entitlements of marriage without providing access to marriage itself.²³

Other

In this category, I include any regime, whether opt-in or opt-out that provides a 'lower-level' form of relationship recognition. This lower level of recognition can stem from several different considerations, including:

- the nature of the relationship;
- the type and amount of protections and entitlements provided; and
- the nature and standing of the jurisdiction offering recognition.

²² For a discussion on the separation of the civil-legal and the religious aspects of marriage, see Chapter 3.

²³ For further discussion on the merits of registered partnerships, especially as compared with marriage, see Chapter 3.

First, there are numerous instances where statutory protections and entitlements are extended to any two persons who share their living environment. That is, in some jurisdictions two persons who are flatmates or friends sharing a home, or a care-giver and the person for whom they care, or a grandparent and grandchild who share the same home, may, by virtue of the relationship between them, have access to protections and entitlements in law.²⁴

Second, the range of protections and entitlements offered is, in most instances, somewhat restricted. They tend to be limited mainly to tangible matters such as housing (being able to take individual possession of the home that was previously shared) and finances (insurances, pensions, etc). They do not extend to intangible or family-related matters (such as adoption, custody, etc).

Third, in some cases these types of recognition regimes are provided at a national or federal level. Often, however, they are provided by regional authorities at state, county or city council level. In some instances, some protections and entitlements may be provided at a corporate level – whether public agencies or commercial organisations.

²⁴ For example:

- The Hawaii (Reciprocal Beneficiaries law (Act 383) 1997) includes any two single adults.
- The Relationships Act 2003 (Tasmania, Australia) includes older companions, carers and the people they care for and people in ethnic and indigenous families whose kinship ties are not recognised in traditional western law.
- The Significant Personal Relationships Bill (New South Wales, Australia) includes same sex relationships and “other relationships irrespective of their sexuality”: <http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA19970925006> (Retrieved: 23 June 2009).
- The Relationships Act 2008 (Victoria, Australia) which applies to de facto couples, known under the Act as domestic partners. Can be ‘opt-in’ (by registration) or by presumption (where relationship of 2 years or more and certain residential requirements in Victoria are met, etc).
- The Family Relationships Act 1975 (South Australia), as amended by the Statutes Amendment (Domestic Partners) Act 2006, Includes persons who live in a “close personal relationship” (s.11A), which includes “(a) the relationship between a legally married couple; or (b) a relationship where 1 of the persons provides the other with domestic support or personal care (or both) for fee or reward, or on behalf of some other person or an organisation of whatever kind” (s.11); [http://www.legislation.sa.gov.au/LZ/V/A/2006/STATUTES%20AMENDMENT%20\(DOMESTIC%20PARTNERS\)%20ACT%202006_43/2006.43.UN.PDF](http://www.legislation.sa.gov.au/LZ/V/A/2006/STATUTES%20AMENDMENT%20(DOMESTIC%20PARTNERS)%20ACT%202006_43/2006.43.UN.PDF) (Retrieved: 23 June 2009).

In the context of this thesis, contrary to considerations of ‘dignity’ (which will develop throughout this thesis) it is not acceptable to suggest that:

- a loving, committed relationship ‘in the nature of marriage’ should be equated to flatmate or friends who happen to be sharing a home; and
- same-sex couples, by virtue of being equated to flatmates or friends, should accept a lower level of protection or entitlement.

For these reasons, I have eliminated from any further consideration in this thesis, any type of relationship recognition that might come within this ‘other’ category.

Recognition of Same-Sex Couples in Overseas Jurisdictions

It is recognised that overseas jurisdictions must, by nature of their own legal evolution, have some very different matters to consider when examining an issue such as same-sex marriage. However, it is also useful to draw parallels or distinctions where appropriate. On this basis, my thesis includes comparative material from overseas jurisdictions.

There are useful comparisons amongst several of the countries that, in terms of over-all parliamentary system, are most alike to New Zealand. Of these, Canada has shown itself to be the most activist in relation to gay rights matters – now leaving New Zealand in its wake, in my view. Conversely, other jurisdictions, Australia being a notable example, tend to be dragging along behind.

Comparisons with Canada are particularly useful in light of the fact that the wording of the New Zealand Bill of Rights Act 1990 is based very closely on the wording of the Canadian Charter.

It is useful also:

- to consider events in the State of Massachusetts in the United States of America (USA), in South Africa, and in European countries, such as The Netherlands, Belgium and Spain, where access to marriage is a reality; and
- to consider these in direct comparison with the States of Hawai‘i, Vermont and California in the United States of America, and Denmark and France (for example) in Europe, which have registered partnership legislation.

THESIS OUTLINE

There are five key Parts to this thesis, each consisting of a number of Chapters. These are outlined as follows:

Part I - Introduction

This Part provides introductory information, including:

- the thesis statement;
- a statement of objectives;
- a personal statement;
- an outline of the parameters of the thesis; and
- the methodology applied to this thesis, and ethical considerations.

Part I contains the following Chapters:

Chapter 1 - Introduction

Chapter 2 – Methodology

Part II – Contextual Considerations

This Part provides a range of information relating to the context in which this thesis was written. It is my intention that this information provides the reader with a framework for receiving and considering all the information that is presented in these and the subsequent chapters.

Part II contains the following Chapters:

Chapter 3 – Personal Perspectives

Chapter 4 – Human Rights and Citizenship

Chapter 5 – Commitment and Courage

Part III – Chronology and Comparative Analysis

This part examines what has happened in New Zealand and in a number of overseas jurisdictions with regard to the provision of equal access to marriage for same-sex couples. Over-all, this part provides a chronology of events, and a comparison of the progress made in New Zealand as compared with the other countries. As was stated in Chapter 1, this thesis has a ‘cut-off’ date as at the end of 2006, and for this reason, Chapter 9 provides only a brief summary and comment on developments from the beginning of 2007.

Part III contains the following Chapters:

Chapter 6 – Developments up to 1993

Chapter 7 – Developments 1994 to 2000

Chapter 8 – Developments 2001 to 2006

Chapter 9 – Postscript: 2007 onwards

Part IV – Summary and Conclusion

This Part provides a summary of the key themes arising in this thesis, a list of options for future action towards access to equal marriage for same-sex couples, and a summary of some of the changes that will be needed if any of these options are to be successful.

Part IV contains the following Chapter:

Chapter 10 – Summary and Conclusion

Chapter 2

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BACKGROUND

I entered law school at the University of Waikato in 1991 having already been in the workforce for a period of 14 years as a secondary school teacher and as a social worker and family counsellor. These jobs required an awareness of the statutory parameters of the law.

I learned from experience that law is not merely a matter of “black letter” law but is much more than that. The law in operation impacts directly upon peoples’ lives. Depending on how the “black letter” law is framed it can be interpreted in a supportive way which protects the rights of individuals or groups or, conversely, it can be employed to hinder citizens’ enjoyment of their daily lives. Even where the “black letter” law is seemingly good law, often, through its interpretation or implementation, it can work against particular persons or in favour of others.¹

Before the Law School at the University of Waikato formally opened its doors to fully-fledged law students,² there was talk about the new type of programme that the Law School was preparing to offer, as a departure from the way in which other law schools were operating at the time. In direct comparison with the more traditionalist, “black letter” law focussed approach of the existing New Zealand law schools, there had been discussions and planning for a Law School that would teach and research the law, not in isolation from, but within the context of, the wider social setting.

¹ In New Zealand, for example, since 1993, permanent residency applications for overseas partners of New Zealand citizens in de facto opposite-sex and same-sex relationships have been assessed under the same immigration policies and rules. However, statistics would suggest that a same-sex partner is significantly less likely to be successful than an opposite-sex partner – for the period from 1993 to 1999, almost twice as many same-sex partners were declined (32.11%) as compared with different-sex partners (17.18%). Thus the rules (the “black-letter law”) are the same, but the application of those rules is different. It should be noted that separate statistics for same-sex and different-sex relationships are no longer kept by the Immigration Service as same-sex and different-sex de facto couples are now said to be treated the same under New Zealand law.

The philosophy of the Law School was to be centred on the “demands for social justice and human rights”,³ and was particularly to focus on the rights of disempowered groups in society and to focus on such rights with a proactive social conscience. As noted in “Te Mātāhauariki” (essentially the founding document of Waikato Law School) the “Gold Report on the Reform of Legal Training in New Zealand” stated that law students needed:⁴

... to know the relationship between law and business, human and industrial relations, politics, social policy and so on. The study of laws alone is an insufficient preparation for a complex social milieu in a dynamic nation.

Te Mātāhauariki went on to say:⁵

We understand that law and the personnel of the legal system operate not in vacuo but within a social, political and economic environment, and can only be understood as such. Law is a product of both these forces and a force in its own right affecting their developments.

The study of “law in context” was a founding principle of the Waikato Law School, and the phrase “law in context” became the Law School’s catch cry.

I feel particularly comfortable with this approach. I do not consider that law operates in isolation. Law colours and shapes the attitudes of all members of society. Likewise the attitudes of all citizens of our country influence the fabric of the law.

In this thesis, I have emphasised my focus on the issue of access to marriage by same-sex couples not in isolation from the context in which the issue is being debated, but with particular reference to this context. The context includes a range of points of focus, including:

- the human rights environment;

² The University of Waikato had offered a Law Intermediate programme before the Law School formally opened with successful students then progressing to Law Schools at other universities to continue with their degrees.

³ University of Waikato, “Te Mātāhauariki”, Report of the Law School Committee, University of Waikato (February 1988): 5.

⁴ Cited in: University of Waikato, “Te Mātāhauariki”, Report of the Law School Committee, University of Waikato (February 1988): 22.

- the personal perspective; and
- the historic and legal framework.

In turn, the legal framework includes considerations of the legal sector / legal system generally, and family law and human rights law specifically. Further, I consider it important to view the legal sector / legal system as being comprised only of existing legislation (statute law) and the actions of the courts in interpreting (case law). An integral part of the legal framework in which this thesis is located is the development of policy relating to the legal recognition of same-sex relationships and the encapsulation of that policy within legislation.⁶

Placing the legal considerations within this wider context means that the thesis moves from being solely a legal academic thesis, to a thesis which includes a significant level of meaning for those persons directly affected by developments in this area of family and human rights law in New Zealand.

This has inevitably influenced the manner in which I have approached this topic and the methodology employed in the research and writing of this thesis.

By virtue of my extensive involvement and keen interest in the specific issue of same-sex marriage and the more general issues of recognition and treatment of same-sex relationships, much of the thesis is written from a personal, experiential perspective. In general, the methodological approach is qualitative rather than quantitative. However, the essentially qualitative approach employed does not deny the ability to incorporate some quantitative information about, for example, the level of support amongst particular or general populations for same-sex marriage, the response of same-sex couples to registered-partnership or civil union regimes as compared with marriage.

⁵ University of Waikato, “Te Mātāhauariki”, Report of the Law School Committee, University of Waikato (February 1988): 23.

⁶ This notion was supported by the Re-Evaluation Team appointed in April 2000 to undertake the a review of human rights protections in New Zealand who, in their Report, the Re-Evaluation Team recommended “early consideration of human rights issues and obligations in the policy-making process, rather than waiting for cases to be taken to complaint or prosecuted in the courts”. See further discussion on the review and its recommendations in Chapter 8.

The combination of approaches, I believe, sits comfortably with my over-all objective of providing a thesis that canvasses the legal issues, but does so in a manner that is readable and accessible in a meaningful way to those for whom the issues are also important.

In an analytical framework, it is wholly acceptable and appropriate to employ a range of approaches in the presentation of argument on an issue such as that which is the focus of this thesis.⁷

THEORETICAL APPROACH

Introduction

In this thesis, I have employed two key research methodologies that I consider to be complementary. In essence, the research styles of this thesis are:

- participatory action research; and
- academic investigation and analysis.

Very commonly, a thesis in the discipline of laws will be written from a purist legal academic perspective. However, because of my desire to emphasise the law-in-context nature of this issue, and because of the range of my experience and involvement with the issues, it is appropriate that this thesis be founded fundamentally in these two approaches.

As stated previously, I have been committed to ensuring that this thesis is meaningful to those who are involved in, and affected by, the issues under investigation and consideration – the key issue being that of access to marriage for same-sex couples. Participatory action research, by its very nature, assists in attaining and retaining this connection:⁸

Community-based action research takes into account people's history, culture, interactional practices, and emotional lives. Although it makes use of techniques and strategies commonly applied in the behavioural and social sciences, it is a more user-friendly approach to investigation than most.

⁷ Babbie, Earl, The Practice Of Social Research, Wadsworth Publishing Company, California, USA (1992): 109: "The use of several different research methods to test the same finding is sometime called triangulation and you should always keep it in mind as a valuable research strategy".

⁸ Stringer, Ernest T., Action Research: A Handbook For Practitioners, Sage Publications, California (1996): 15.

Unlike the elaborate routines of traditional scientific research, which, from the perspective of the practitioner, are often shrouded in the mists of technical language and mystified by complex statistical procedures, community based action research is presented in terms that make it accessible to both practitioners and laypersons.

Participatory action research – being heuristic in nature ⁹ – reflects the experiences of the analyst or decision-maker, and other participants, as persons living from day to day within the current social, cultural and legal contexts – a ‘subjective’ element.

On the other hand, with this being a thesis in laws, it is necessary to undertake academic analysis of human rights law and family law. Also, in the context of same-sex marriage and international developments in this area, it is necessary to undertake an analysis of development in New Zealand, both in their own right and compared with what has been and is happening overseas – an ‘objective’ element.

Academic investigation and analysis serves to bring a wealth of ‘arms-length’ information about developments (past and present) in New Zealand and across a range of other jurisdictions. It entails analysing and synthesising primary and secondary resources relating to the rights of gays and lesbians as individuals and as couples. In undertaking this examination, the goals are to consider the findings of others (in this case, including judicial decisions and academic writings), and extending or challenging those views.

The use of these complementary research techniques enables the experiential involvement and learning to be combined with, and balanced by, academic rigour. This dual approach, on the one hand, allays concerns about the potential for accusations of bias stemming from the participatory approach and, on the other hand, offsets potential accusations that the overall analysis lacks the empathic understanding of issues from the point of view of those most affected at a personal level.

Accessing and analysing information from a diverse range of sources and by applying a range of research approaches and techniques provides a broad knowledge base from which to:

- analyse the key issues (problems); and

- formulate proposals for change and improvement.

This section provides a background and some of the theoretical reasoning behind the methodologies employed in writing this thesis.

Participatory action research

Action research is defined as:¹⁰

a form of self-reflective enquiry undertaken by participants in social situations in order to improve the rationality and justice of their own practices, their understanding of these practices, and the situations in which the practices are carried out.

In using action research as a research tool, the researcher is actively involved in the cause for which the research is conducted. Basically, action research is about ‘learning by doing’, where:¹¹

a group of people identify a problem, do something to resolve it, see how successful their efforts were, and if not satisfied try again.

Action research could be described as a combination of learning by experience, problem-solving and being results-focussed. Throughout the writing of this thesis I have been actively engaged with others working closely on the same-sex marriage issue in defining ‘the problem’, seeking options for change, and working for such change.

According to Dorothy Gabel, action research is suitable for participants who recognize the existence of shortcomings in existing practices and who would like to, in an iterative fashion:¹²

- adopt some initial stance in regard to the problem;
- formulate a plan to modify existing practices;

⁹ See brief discussion on ‘heuristics’ later in this Chapter.

¹⁰ Carr, W., and Kemmis, S., Becoming Critical: Education, Knowledge And Action Research Lewes, Falmer (1986): 162.

¹¹ O’Brien, Rory, “An Overview Of The Methodological Approach Of Action Research”, in Richardson, Roberto, Theory And Practice Of Action Research, Universidade Federal da Paraíba, João Pessoa, Brasil (2001): 1.

¹² Gabel, Dorothy, “Presidential Address: National Association For Research In Science Teaching”, San Francisco (24 April 1995), citing Hopkins, D., A Teacher’s Guide To Classroom Research, Philadelphia, Open University Press (1985): <http://physiced.buffalostate.edu/danowner/actionrsch.html> (Retrieved: 30 June 2009).

- carry out an intervention;
- evaluate the outcomes; and
- develop further strategies.

Action research, by its very definition, relies on involvement in the issues and therefore:

- requires that the researcher has a strong interest in the issues;
- requires that the researcher has a keen understanding of the issues;
- lends itself to a study of the issues within the context in which they occur;
- above all, action research fulfils a dual (research and social) purpose in that it:
 - enables the researcher and other persons involved to undertake a study of a system or process; and
 - collaboratively, between the researcher and the other persons involved, to bring about what is intended to be positive change.

Action research tends to be used in real, 'field' situations rather than in theoretical 'laboratory-type' situations. It is an approach often employed by professionals / practitioners wishing to improve the way in which they operate, or by lobbyists or activists seeking to change the way in which, for example, they are treated by a particular law or practice. It is an approach in which the researcher:

- takes an existing practice, becoming conscious of the problems that arise from that practice and who is most affected by those problems and how;
- formulates questions about the problems which are faced in order to be able to focus on what is required to respond;
- plans and deliberates about how to commence the process of inquiry and who else should be involved in this process;
- needs to be systematic and rigorous in the effort to get answers;
- must undertake careful recording and documentation of the actions that are being undertaken;

- is required to be self-reflective and self-critical when seeking to reach conclusions;
- strives to understand the problems, issues, and potential solutions in order to be able to improve current actions or processes; and
- seeks to change current actions or processes as a result of research undertaken, and is prepared to re-evaluate these changes.

As part of the research process, the researcher is open about the subjective nature of the approach, acknowledging the potential for bias, and therefore being open either about ways of moderating that bias or, at least, being open about the very possibility of the existence of that bias.

The researcher must be aware that being involved in the issues is likely to have a direct influence on what is being investigated and on developments that may occur within the area being investigated. Conversely, the researcher needs to be receptive to being influenced by the events and people who are the subject of the research. Essentially, the researcher needs to be able to ask:

- “What?” –What did I learn from it?; and
- “So what?” –How would I do things differently? Has it opened up an avenue I hadn’t thought of before? Am I being open to what has been presented to me?

As Monica Colombo puts it:¹³

The task of researchers therefore becomes to acknowledge and even to work with their own intrinsic involvement in their research process and the part this plays in the results that are produced. Researchers must view the research process as necessarily a co-production between themselves and the people they are researching.

With research taking place in the real world, the goal is about solving real problems. Being involved in the issues is a great way to learn about those issues, and also assists greatly in being able to apply the results of what has been learned.

¹³ Colombo, Monica, “Reflexivity And Narratives In Action Research: A Discursive Approach”, in [2003] 4:2 Forum: Qualitative Social Research Art.6. <http://www.qualitative-research.net/fqs/> (Retrieved: 29 July 2009).

Participant observation

This thesis also contains some elements of participant observation. Participant observation tends to suggest that the participant observer is (originally) an 'outsider' who becomes an 'insider' for the purposes of observational research. Although I have come to this study as an 'insider' from the outset, this topic is an ideal candidate for study and consideration from this standpoint of involvement. As commented by Jorgensen:¹⁴

The methodology of participant observation is appropriate for studies of almost every aspect of human existence. Through participant observation, it is possible to describe what goes on, who or what is involved, when and where things happen, how they occur, and why – at least from the standpoint of the participants – things happen as they do in particular situations. The methodology of participant observation is exceptional for studying processes, relationships among people and events, the organization of people and events, continuities over time, and patterns, as well as the immediate sociocultural contexts in which human existence unfolds.

Jorgensen continued:¹⁵

The methodology of participant observation consists of principles, strategies, procedures, methods, and techniques of research.

Participant observation is defined here in terms of seven basic features:

- 1) A special interest in human meaning and interaction as viewed from the perspective of people who are insiders or members of particular situations and settings.
- 2) Location in the here and now of everyday life situations and settings as the foundation of inquiry and method.
- 3) A form of theory and theorizing stressing interpretation and understanding of human existence.
- 4) A logic and process of inquiry that is open-ended, flexible, opportunistic and requires constant redefinition of what is problematic, based on facts gathered in concrete settings of human existence.

¹⁴ Jorgensen, Danny L., Participant Observation: A Methodology For Human Studies, Sage, Newbury Park, California (1996): 12.

¹⁵ Jorgensen, Danny L., Participant Observation: A Methodology For Human Studies, Sage, Newbury Park, California (1996): 13-14.

- 5) An in-depth, qualitative, case study approach and design.
- 6) The performance of a participant role or roles that involves establishing and maintaining relationships with 'natives' in the field.
- 7) The use of direct observation along with other methods of gathering information.

Ultimately, the methodology of participant observation aims to generate practical and theoretical truths about human life grounded in the realities of daily existence.

Overt participant observation involves the researcher being openly involved in activities in the field of study, and it is essential that the researcher become integrally involved in the issues – as has been the case with my involvement in working on the issue of the legal recognition of same-sex relationships through marriage.

This involvement should also be sustained – the longer the period of time involved and the more complete the involvement, the more meaningful the information obtained:¹⁶

The character of field relations heavily influences the researcher's ability to collect accurate, truthful data.

The ability to consider the issue central to this thesis from the point of an insider is invaluable. With an issue based in a human rights framework, where the consequences of decisions made on the issue impact on the lives of individuals of the affected group, it is particularly pertinent to have an understanding of the reality of that impact. That is, it is vital to have an intimate understanding of the perception of those centrally involved in this issue on how it impacts on them. While it may be possible to measure, through surveys and questionnaires, quantitative aspects of impact, such evaluation fails to register the qualitative and more personal aspects.

An understanding at this level also provides greater ability to assess the potential impact of changes that might be made. For example, the participant observer is arguably in a better position to consider proposed

¹⁶ Jorgensen, Danny L., Participant Observation: A Methodology For Human Studies, Sage, Newbury Park, California (1996): 21.

legislative amendments and assessing what impact they might have on the object group.

Participant observation is an appropriate methodology to employ in an investigation of the issue of legal recognition of same-sex relationships – especially when the key tool for this examination is human rights law.

Academic analysis

In relation to legal studies, academic analysis can mean a number of things. Specifically in relation to law the key areas of consideration here are:

- statutory interpretation;
- case-law reasoning;
- examination and analysis of primary information; and
- examination and analysis of secondary information.

Statutory interpretation

Statutory interpretation is the process of taking the words of a statute, as written, and giving them meaning. In the formal or official sense, this is generally the role of the courts. Bennion describes this role as a ‘duty’ of the court as an interpreter to arrive at a legal meaning of legislative provisions that are placed before it for consideration:¹⁷

(1) The interpreter’s duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation ...

(2) The court is never entitled, on the principle non liquet (it is not clear) to decline the duty of determining the legal meaning of a relevant enactment.

In fulfilling their interpretive role, the courts are obliged to adhere to certain principles of interpretation in seeking to attain clarity in their understanding of the legislation, and in conveying that clarity to all who

¹⁷ Bennion, F.A.R. (Ed), Bennion On Statutory interpretation: A Code, 5th Edition, LexisNexis, UK (2008): 24.

use, or are affected by, the legislation:¹⁸

... courts are to apply that which they take to be the intended meaning of a statutory provision so long as it is a possible meaning of the language used ... In deciding what is a possible meaning the courts should rely on their understanding of the conventions governing the ordinary use of language. To decide what was the intended meaning of a provision they should take account of what appears to be its purpose, as well as of any other indications of its meaning available to them.

In essence, the courts are required to establish the meaning of statutory provisions having regard to the purpose of the relevant provision, the intention of Parliament in enacting or retaining that provision, and the meaning of the words of the provision (bearing in mind that the purpose and intent of a statutory provision cannot be given effect if the wording of the provision precludes such an interpretation).¹⁹

Although there are overarching principles applied to statutory interpretation, the 'rules' of interpretation are not definite. Rather, they comprise a menu of techniques that can be employed by Judges in their decision-making role, but can and should also be used by those who are preparing their arguments for consideration by the courts. It is an essential element of the roles of legal academics, practitioners or advocates to interpret and re-interpret the language of the legislation with which they work. In a general sense, the same principles of statutory interpretation apply whether it is domestic or international legislation that is under consideration.

I have engaged with the processes and principles of statutory interpretation in this thesis as a means of establishing what I consider to be the meaning of specific statutes and statutory provisions, and examining and analysing the courts' interpretations of various statutes and statutory provisions.

Case-law reasoning

¹⁸ Evans, J., Statutory Interpretation: Problems Of Communication, Oxford University Press, Auckland, New Zealand (1988): 2.

¹⁹ For further discussion on these points see the section on 'heuristics' later in this chapter.

Similarly, it is vital for legal academics, practitioners and advocates to be able to read the decisions of Judges and to understand what those judgments are saying about the legal issues in question.

As part of gaining an understanding of the current status of the law in practice, it is imperative to be able to identify and isolate the core issue or issues before the Court in any particular case. This requires being able to discern the difference between the reason for the decision (that is, the 'ratio' or 'ratio decidendi') and the general opinings of a Judge (that is, the 'obiter' or 'obiter dictum').

The ratio decidendi constitutes the core reasoning and basis for the decision in any case. The decision, based on this elemental reasoning, is binding on inferior courts. The "New Zealand Law Dictionary" defines ratio as follows:²⁰

The principle of law on which a Court bases its decision. The ratio decidendi of a case is binding on inferior Courts under the system of judicial precedent.

On the other hand, obiter is a statement of opinion, a statement given by the way, and, while it may be persuasive, is not binding on lower courts. The "New Zealand Law Dictionary" defines obiter as follows, using the given example.²¹

A statement of a Judge on a point of law not essential to the decision of the case before him or her. "... the statement of the Court was not part of the decision in that case. It must therefore be regarded as obiter and in no way binding on this court ..."

The distinction between ratio and obiter becomes particularly important, for example, in analysing and providing commentary on the decisions of the court. It enables, on the one hand, the identification of those elements of the written judgment upon which the court has relied for its decision and which therefore comprise the binding law on the relevant point or points. And it enables, on the other hand, the identification of those parts of the judgment that may be relevant to, but are not binding on, future considerations of the issues.²²

Examination of information

²⁰ Spiller, P. (Ed), "Butterworth's New Zealand Law Dictionary", 5th Edition, LexisNexis Butterworths, Wellington, New Zealand (2002): 253.

²¹ Spiller, P. (Ed), "Butterworth's New Zealand Law Dictionary", 5th Edition, LexisNexis Butterworths, Wellington, New Zealand (2002): 207.

In addition to a consideration of the statutes and court decisions, it is essential to consider and analyse a range of information from other primary sources.

For example, documents such as Parliamentary records including Hansard (transcripts of Parliamentary Debates), Reports of Parliamentary Select Committees, and Commentaries attached to Parliamentary Bills can all provide valuable information about the intent of Parliament as well as wider information about the views of Parliamentarians and their constituencies.

Additionally, the writings of legal scholars, whether these be acknowledged legal texts or published articles, can provide authoritative analysis of past or current legal issues and environments, or they may provide information that acts as a catalyst for further discussion. Such writings can also provide points of agreement or points of disagreement and argument. In the process of analysing any issue, it is important not only to provide reference to material that supports a particular point of view, but also to be able to refute that which opposes the writer's preferred point of view.

It is useful also to use a range of secondary source information. This can be particularly useful, for example, in assisting to establish the social context in which a particular point is being made.

These secondary sources are available, for example, through media reports (printed media and radio and television), public debates and general public commentary and, particularly from other persons directly involved in or directly impacted upon, by the topic and issues which are the subject of research.

Comparative Analysis

As I have stated previously, it is preferable to consider the law, and the impacts of that law, in the context in which it functions. In a similar vein, legal developments in New Zealand do not happen in isolation from developments in other jurisdictions. Historically, New Zealand law has derived from British law but, particularly in recent decades, has moved

²² See application of this in relation to my commentary on the Quilter same-sex

away from those colonial connections and New Zealand jurisprudence is developing in its own unique way to suit the New Zealand situation. On the other hand, greater global connection, through travel and technology, means that we inevitably look to other jurisdictions for ideas and, possible, guidance. This will be demonstrated in this thesis by the close jurisdictional connection between New Zealand and Canada, in particular, but also the influence of developments in countries such as the United States of America, South Africa, and a range of European countries.

Naturally, the jurisdictions with which a comparison is to be made should have some similarities to the 'home' jurisdiction – socially, culturally, constitutionally, and jurisprudentially.

It is also important to undertake these comparisons within a meaningful framework. In this respect, while the obvious point of comparison is the success in attaining of marriage equality for same-sex couples and the reasons for that success.

HOW THE INFORMATION HAS BEEN GATHERED

The source material for this thesis is reflective of the different approaches and involvement in the issues as outlined above, being a combination of information gathered as a consequence of my personal involvement in the issue, and a consideration of primary and secondary materials gathered for the academic and comparative analysis of the key issues.

The material used for this thesis consists of:

- statute-law and case-law from New Zealand;
- statute-law and case-law from various overseas jurisdictions;
- academic writings (books and journal articles) authored by legal academics;
- notes and records from personal experiences as part of the team involved in the Quilter same-sex marriage case at the High Court and the Court of Appeal;

marriage case in Chapter 7.

- participation in conferences and seminars either specifically about gay and lesbian issues, or more generally about human rights laws, or the place of human rights laws within the New Zealand constitutional framework;
- discussions with groups in the community (both gay and lesbian – “queer” – groups, and other groups interested and involved in wider human rights issues);
- lessons learned in the process of providing advocacy for gay men and lesbian women with regard to specified legal issues;
- communications with Members of Parliament – either by way of , for example, formal submissions to Parliamentary Select Committees, or individually;
- media reports - newspaper and newswire items from around the world, radio and television discussions and reports.

This material has been gathered from a range of difference sources as outlined in the following sections.

Primary sources

I have gathered a range of judgments on the issue of same-sex marriage itself and on related issues. The same-sex marriage cases specifically referred to in this thesis have occurred in New Zealand, Canada, United States of America and South Africa. There are also other cases of relevance relating to matters such as mixed race marriage,²³ and partner entitlements.²⁴

I have also examined a wide range of legislation from New Zealand and from overseas jurisdictions. Most of this has been related to the central issue of the legal recognition of same-sex relationships (marriage and registered partnerships). Some, however, has been on related issues

²³ Loving v Virginia 388 U.S. 1 (1967).

²⁴ Egan v Canada [1995] 2 S.C.R. 513 (Canadian case on superannuation entitlements); M v H (1999) 2 S.C.R. 3 (S.C.C.) (Canadian case on definition of ‘spouse’ and access to range of entitlements available to married partners).

such as the criminal law,²⁵ partnership-related laws,²⁶ human rights laws,²⁷ and family law.²⁸

I have also undertaken a substantial review of a wide range of academic writings. These have consisted of books specifically on the topic of same-sex marriage, as well as a large number of publications from journals on law and human rights issues as well as on matters relating to sexual orientation, family and other associated subjects. I have also participated in a number of international conferences in the legal recognition of same-sex couples, same-sex families and gay (same-sex) rights as human rights. I have gathered a wide range of information from all these sources.

Advocacy

Quilter

In 1996, I provided information to the applicants, and their legal counsel, for the same-sex marriage case that was heard on 24 and 26 of April of that year in the High Court in Auckland.²⁹ I was also involved in the discussions that took place in the lead up to that case, attended the hearing, and participated in follow-up discussions.

I had similar involvement in 1998, when the appeal from the High Court case was heard by the Court of Appeal in Wellington.³⁰ I also acted as Junior Counsel in that case.

Joslin

In 1999, I provided comment to Andrew Butler on the draft Communication (Complaint) to the United Nations Human Rights

²⁵ For example, the Offences Against the Person Act 1867 (NZ), the Criminal Code Act 1893 (NZ), and the Homosexual Law Reform Act 1986 (NZ).

²⁶ For example, the Property (Relationships) Act 1976 (NZ).

²⁷ For example, the Human Rights Act 1993 (NZ), New Zealand Bill of Rights Act 1990, The Canadian Charter of Rights and Freedoms, and various international law treaties.

²⁸ For example, the Adoption Act 1955 and the Care of Children Act 2004.

²⁹ Quilter v Attorney-General (1996) 14 FRNZ 430 (High Court).

³⁰ Quilter v Attorney-General [1998] 1 NZLR 523 (Court of Appeal).

Committee on same-sex marriage in New Zealand.³¹ Subsequently, I acted as Counsel for the Authors (Complainants) in drafting the Final Response to the United Human Rights Committee in relation to the original Communication and in response to the Response of the Government of New Zealand.

Civil Union Bill Committee

In 2000 and 2001, I was a member of a committee established by Tim Barnett (Government MP) to assist with work on proposals for the legal recognition of same-sex relationships. The initial work consisted of an examination of legislative requirements for:

- possible amendments to the Marriage Act 1955 to enable equal access to marriage for same-sex couples; and
- possible new legislation providing for the registration of partnerships as an alternative to marriage.

As the work of this Committee progressed, work on amendments to the Marriage Act was set aside, and the Committee focussed on what was to become the Civil Union Bill. In the absence of any intention to consider amendments to the Marriage Act 1955 but, instead, to implement a registered partnership regime only, I resigned from this Committee on 11 April 2001 stating that:³²

I continue to have a great deal of difficulty in working towards a regime which would continue to tell me, my partner, and other persons with whom I interact on a daily basis, that my relationship and those of other same-sex couples are not as valid as those of different-sex couples.

Relationship Property

I have been involved with the 'new' relationship property legislation in three ways through:

- preparing and presenting a submission to the Parliamentary Select Committee during the consideration of the property (Relationships) Bill 2000;

³¹ Joslin v New Zealand, Communication No. 902/1999.

³² Nigel Christie, Letter of Resignation to the Civil Union Bill Committee (CUB Committee) (11 April 2001).

- providing educational presentations on the new legislation to groups of same-sex couples wanting to know more about the new legislation; and
- drafting Relationship Property Agreements for same-sex couples who have wished to opt out of the statutory regime.

Immigration

I have assisted partners of New Zealand citizens who have applied for permanent residence in New Zealand, in some instances, acting as the 'agent' of the applicant.

Domestic Violence

I have assisted gay men who have become the victims of domestic violence perpetrated towards them by their partners in working through the issues they have faced. I also participated in the New Zealand Law Commission's work on domestic violence in same-sex relationships by providing resources and discussing, with the researchers at the Commission, the unique issues faced by gay men as victims of domestic violence.

Adoption and family issues

I have been centrally involved in the issue of adoption by same-sex couples in New Zealand. This entailed the presentation of a complaint to the New Zealand Human Rights Commission with regard to the discriminatory nature of the Adoption Act 1955.³³

Community Involvement

Communications (debate, commentary, and education)

I have participated in public debate, through speeches and public discussions, and involvement with the media (newspapers, radio and television).

³³ See brief discussion of a recent revival on the issue of adoption by de facto (same-sex and different-sex) couples in Chapter 9.

I have been involved in various gay (and other) community groups, where discussion regularly takes place on legal issues relating to same-sex couples.

I have established a 'virtual' organisation that provides information on gay rights issues and, to the extent relevant, on lesbian rights issues. I have made a certain amount of information available online at <http://homepages.paradise.net.nz/nigelchr/index.htm>, and receive requests for further information which is provided by e-mail.

Involvement in Government processes

With regard to the recognition of same-sex couples, I have participated, as a private citizen, in the presentation of material to Select Committees and in discussions with politicians, both individually (through letters and meetings) and through the political processes of submission-writing and oral presentation.

My intimate knowledge of Government processes has influenced greatly the way in which I have approached this thesis. In my paid employment, I have worked as a legal researcher with the New Zealand Law Commission (on topics unrelated to this thesis), as a Senior Policy Analyst with the Ministry of Maori Development (Te Puni Kokiri), and as a Manager in Operational Policy with the Special Jurisdictions Group of the Ministry of Justice (once again, in both cases working on topics unrelated to this thesis). These positions have all given me an opportunity to participate directly in the processes of Government, to attend and chair meetings with other Government officials, and to attend meetings with, and present papers to, Ministers, Cabinet Committees and Cabinet.

Conferences and publications

I have attended, and participated in conferences in New Zealand and overseas:

- International Conference on "Same-Sex Couples and the Law" in London, England, in July 1999;
- International Conference on "Marriage, Partnerships and Parenting in the 21st Century" in Turin, Italy, in June 2002;

- International Conference on “Gay Rights as Human Rights”, Montreal, Canada, in July 2006; and
- Pink Health Conference on “Celebrating Our Relationships”, Christchurch, New Zealand, in May 2007.

In addition to minor commentaries for New Zealand and overseas gay and mainstream publications, I have had three key publications:

- “Comment: Thinking About Domestic Violence in Gay Male Relationships”, in [1996] 4:1 Waikato Law Review 180;
- “Same-Sex Relationships In The Nature Of Marriage”, in [2003] 6:3 Human Rights Law And Practice 188; and
- “The New Zealand Same-Sex Marriage Case”, in Wintemute, Robert, and Andenaes, Mads, Legal Recognition Of Same-Sex Relationships, Hart Publishing, London (2001).

I have also had direct involvement by providing information to Counsel or as Amicus Curiae in:

- the Halpern same-sex marriage case in the Court of Appeal for Ontario (Canada);³⁴
- the Goodridge same-sex marriage case in the Supreme Judicial Court of Massachusetts (USA);³⁵
- the Kerrigan same-sex marriage case in the Supreme Court of the State of Connecticut;³⁶ and
- the case of Lawrence v Texas in the United States Supreme Court (a case relating to the criminality of two persons of the same sex engaging in intimate sexual conduct).³⁷

HOW THE INFORMATION HAS BEEN ANALYSED

An heuristic approach

Heuristics is about employing a simplifying strategy to assist in solving a problem or a series of associated problems. Rather than having, or even

³⁴ Halpern v Canada (2003), 65 O.R. (3d) 161.

³⁵ Goodridge v Department Of Public Health 440 Mass. 309 (2003).

³⁶ Kerrigan v Commissioner of Public Health 289 Conn. 135, 957 A.2d 407 (2008).

³⁷ Lawrence v Texas 539 U.S. 558 (2003).

pretending to have a step-by-step, process or set of rules to be followed in a particular circumstance, heuristics is about analysing the key indicators and making from them the best estimate, based on our experiences, of what might be a logical outcome:³⁸

As used in much of the legal literature today, '[heuristics refers to] a rule of thumb, simplification or educated guess that reduces or limits the search for solutions in domains that are difficult and/or poorly understood'.

It is clear that statutory interpretation itself is heuristic in nature – with judges not employing definite and precise rules, but rather relying on principles that are applied to circumstances which, on the one hand, may have many similarities but, on the other hand, may have a range of differences. The court may be limited in the extent to which it is able to:

- apply strict legal principles from one case to another;
- analogise principles from one situation into another situation; or
- distinguish one situation from another situation.

Having said this, unlike trying to predict uncertain events (for example, the outcome of a general election), heuristics in a legal setting do have some degree of constancy, consistency and certainty. Over time, the principles of statutory interpretation, for example, have been examined, considered, analysed and refined. Over time, certain conventions have been accepted into the 'toolkit' of the judiciary and therefore those who work with the law.

However, as suggested by Mullins, the principles of statutory interpretation are tools rather than rules.³⁹ While policy-writers and law-makers strive for as much certainty as possible, this certainty is limited to some extent by complexities stemming from the imprecision of language. There are consequent difficulties with consistency in interpretation even where intellectual processes are consciously applied, and the potential for even greater inconsistency where subconscious influencers enter into the equation.⁴⁰

³⁸ Mullins, Morell E., "Tools Not Rules: The Heuristic Nature Of Statutory Interpretation", in [2003-04] 30 J. Legis. 1: 49: quoting Christopher T Furlow and David B Hennes.

³⁹ Mullins, Morell E., "Tools Not Rules: The Heuristic Nature Of Statutory Interpretation", in [2003-04] 30 J Legis 1.

⁴⁰ Mullins, Morell E., "Tools Not Rules: The Heuristic Nature Of Statutory Interpretation", in [2003-04] 30 J Legis 1: 34-47.

This thesis extends beyond the relatively narrow framework of statutory interpretation *per se*. In this thesis, I bring into the equation my interpretation of circumstances, decisions, and public comments, as well as the interpretations of those persons and groups who are directly affected by the key issue under discussion. It is inevitable that our interpretation of the actions of Government, the views of society at large, developments in New Zealand as compared with overseas, are all going to be coloured by the extent and manner of the impact of those elements on us. In turn, these views are going to influence the manner in which we choose to deal with these issues and the processes that we might choose to employ in order to progress these matters in a direction that is satisfactory to us.

Analysis of the New Zealand situation

The examination of the New Zealand situation commences with a preliminary commentary on the historic origins of New Zealand laws on homosexual behaviour. However, the central examination focuses on:

- legislative developments from decriminalisation in 1986 through to the advent of civil unions (and the accompanying extension of legislative entitlements to same-sex couples) in 2004;
- a consideration of the New Zealand same-sex marriage cases;
- a consideration of the Communication on the issue of same-sex marriage in New Zealand to the United Nations Human Rights Committee.

This analysis is undertaken, not only from the point of view of my personal involvement, but also as an exercise in legal analysis and commentary.

Comparative analysis

It is recognised that overseas jurisdictions must, by nature of their own legal evolution, have some very different matters to consider when examining an issue such as same-sex marriage. However, it is also useful to draw parallels or distinctions where appropriate. On this basis, my thesis includes comparative material from overseas jurisdictions.

In the context of this thesis, I pay particular attention to developments in Canada in relation to same-sex marriage – interesting in a general sense because both countries share similarities socially, culturally and constitutionally – interesting specifically because the human rights laws in both countries are somewhat similar, with specific key provisions sharing exactly the same wording.⁴¹

The comparative analysis also extends to examining the New Zealand situation alongside developments in some European countries (The Netherlands, Belgium, Spain, and Norway), the United States of America (Massachusetts, in particular), and South Africa in relation to access to marriage; and in a range of other countries with regard to the provision of registered partnership / civil union regimes.

This comparative analysis examines specific similarities and differences with regard to the regimes – marriage or registered partnerships – that are available and the level of entitlements that stem from these. But more importantly, in relation to those jurisdictions where access to marriage for same-sex couples has become a reality, a key point of this analysis is an understanding of how this success was achieved.

As part of this analysis, there is a discussion of key themes, including the notion of personal dignity that grows from being subject to equal treatment before and under the law, and being seen as full citizens of the country in which one lives.⁴² This discussion will take into account:

- the degree to which same-sex couples have been required to seek access to marriage, as compared with the extent to which this access has been extended to same-sex couples at the behest of governments or Parliaments;
- the degree to which same-sex couples have been provided with access to (equal) marriage rights rather than (“separate but (un)equal”) partnership regimes; and

⁴¹ The Canadian Charter of Rights and Freedoms s.1 provides: “The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it **subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**” (Emphasis added). The New Zealand Bill of Rights Act 1990 s.5 provides: “Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be **subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society**” (Emphasis added).

⁴² See discussion in Chapter 3, and subsequent references throughout the thesis.

- the degree to which gays and lesbians, as individuals or couples, are thereby enabled to participate fully as citizens in the society within which they live.

ETHICAL CONSIDERATIONS

Throughout the writing of this thesis, I have been taken measures to ensure respect for individual privacy, confidentiality and other matters of ethical concern. There is no information in this thesis that breaches the privacy of any person or persons.

Where case studies have been included, these have been anonymised, and where personal communications have been included this has been done with the authorisation of, and / or with acknowledgment to, the persons involved.

In addition to analysis of statute and case law, I have drawn on material from a range of activities associated with the legal recognition of same-sex couples or the treatment of same-sex couples before and under the law in New Zealand – for example, group discussions, working groups, and participation in online newsgroups. Any material obtained from these sources is either public information that is freely available, or the persons involved have given their informed consent for the use of the information gathered to be used in the writing of this thesis.

Part II

CONTEXTUAL CONSIDERATIONS

A central consideration in my writing of this thesis has been the importance to me of:

- (a) the context in which the thesis is written, and
- (b) the context in which the thesis is read.

This means that it is centrally important that I convey my perspective on a variety of matters that assist the reader to understand key points of relevance and the significance of these from my perspective as person who:

- is in a long-term, committed same-sex relationship;
- has been involved actively in issues relating to the recognition of same-sex relationships;
- is legally trained;
- has worked extensively in social service fields; and
- has worked extensively in legal research and government policy.

It is my view that each of the above contributes to a broader understanding of the issues. Each of these underlines the importance to me of ensuring that I explain the broader context in which this thesis is written.

Part II establishes thematic contexts through the discussion of:

- personal perspectives relating to the key forms of relationship recognition, some of the anomalies that exist in the current situation, and how these reflect on the dignity of gay and lesbian citizens;
- the extent to which the current situation facilitates, or limits, full participation in society of gays and lesbians and our ability to reach our full potential within that society;
- issues relating to the level of commitment we, as a society, might have with regard to our human rights laws, and the level of courage we, as a society, maintain with regard to adhering to those laws; and
- a background consisting of historic and legal factors up to the point of decriminalisation of homosexual behaviour in New Zealand, and a background of international human rights laws to which New Zealand has become a signatory.

These are perhaps the most important chapters of the thesis, cumulatively setting the scene for the chronological and comparative analysis that follows.

For me as the author, the key purpose of writing this thesis was to produce a document that is meaningful to the people involved with this issue in the New Zealand setting, and a document that is useful in a practical way in progressing towards full equality.

For this reason, I urge the reader to keep, to the forefront of the mind throughout the reading of the thesis as a whole, the information that is presented in these chapters. I am certain that this will assist in gaining a much greater understanding of the importance of the battle for equal access to marriage by same-sex couples, and the true meaning of equality for those engaged in this battle. I am certain also that the reader will be persuaded that there is no valid alternative to full and equal recognition under the law.

In Chapter 3, I provide my own thoughts on why access to marriage for same-sex couples is considered to be the most appropriate goal by addressing the questions:

- What is it about ‘marriage’ that separates it out from any other way of having same-sex relationships legally sanctioned?
- What is it about marriage that causes me to argue that we should be seeking this as our primary form of relationship recognition?

In Chapter 4, I examine issues of citizenship and human rights. In doing this, I focus on the fundamental precept that any person can only be a full and equal citizen within their society to the extent that that society permits. There is also a difference between the acceptance of gays and lesbians as individuals, and gays and lesbians as couples in loving, committed relationships, and gay and lesbian families. Acceptance of gays and lesbians as couples and families will lead us to full and equal treatment under the law – including access to the right to marry, or access to the right to choose to marry.

In Chapter 5, I raise issues referencing the importance of our commitment, individually and collectively, to human rights standards and the need for us all to have the courage to stand up for those standards.

Chapter 3

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INTRODUCTION

Personal thoughts

Same-sex couples in New Zealand do not yet have the option of getting married. This thesis does not intend to suggest for one moment that the only valid form of formal (civil-legal) recognition of our relationships should be by way of marriage. What it does argue is that the full range of legal options that is available to different-sex couples must also be available to same-sex couples – and this includes marriage as one of the key options.¹

The fight for fairness in the recognition of relationships is the fight to have access to the full range of options for relationship status, protection and benefits. Like our heterosexual counterparts, gay men and lesbians have relationships in a variety of ways, and we choose to structure our lives in many different forms. As such, we need legal options that reflect this reality.

Not all same-sex couples in New Zealand wish to marry. But then, not all different-sex couples in New Zealand wish to marry. Those same-sex couples who do wish to marry cite a variety of reasons for wanting to do so, including:

- the fact that the couple wishes to access the same provisions of the law with regard to relationship recognition as other members of their families;
- the fact that the couple wishes to access the same entitlements that are accessed by those couples around them who choose to marry;
- the very nature of marriage itself, and the status that marriage holds and provides within our wider society; and
- the visibility that recognition brings to an individual / particular relationship and to same-sex relationships generally.

¹ Auckland Lesbian and Gay Lawyers Group, Out Law: A Legal Guide For Lesbians and Gay Men in New Zealand, Auckland Lesbian and Gay Lawyers Group, Auckland, New Zealand (1994): 7: Although the incidents of recognition have increased since 1994 (for example, same-sex partners are expressly included in the Domestic Violence Act 1995), the core relationship is still not accorded the same degree of recognition that opposite-sex de facto couples are given.

For the couple concerned, any one of these might be a valid reason for seeking to marry.

It is acknowledged that some of the attributes of marriage can be achieved by same-sex couples with regard to their relationships without requiring access to marriage itself. For example:

- Same-sex couples can hold secular commitment ceremonies in the presence of friends and family.
- For those who need some religious recognition of their relationship, some churches will willingly hold ceremonies to bless the relationship.
- In some jurisdictions, access to a range of legal protections is extended to same-sex relationships by way of legislation relating to de facto couples.
- In some jurisdictions same-sex couples can access some legal protections by registering as domestic relationships.
- In some jurisdictions same-sex couples might be able to enter into a registered partnership (civil union).

However, none of these provides the equality, inclusion, and acceptance aspired to by those same-sex couples who seek access to marriage. Why, then, has marriage, as an institution, become a goal for many same-sex couples, and why is it seen as a symbol of equality?

The issue of same-sex marriage as a human right is wider than just the ability of a couple to marry. It is about what that means for a couple in two fundamental ways. First are the “practical” reasons for seeking marriage. By practical reasons, I mean those reasons which can be viewed as the more tangible and outwardly demonstrable elements of a relationship. These include property rights and those matters generally linked to financial and economic matters, rather than the core relationship issues. Second, and I believe more importantly, are the more ethereal elements related to the essence of the relationship. By this I mean matters related to the core relationship between the two partners and the meaning of this relationship to them as a couple and to their family and friends around them.

There are forms of relationship recognition other than marriage. In Chapter 1, I provided a preliminary discussion in which I discounted the 'lower-level' recognition through what I termed domestic partnerships. In this chapter, therefore, I concentrate on the comparison between registered partnerships (civil unions in the New Zealand setting) and marriage. With this in mind, I first consider registered partnerships and the extent to which I consider they provide adequate and appropriate recognition of relationships. Second, I consider marriage and, in particular, the points of difference that elevate marriage above registered partnerships as an acceptable form of relationship recognition.

REGISTERED PARTNERSHIPS ²

After the first registered partnerships regime was enacted by Denmark in 1989, there was a fairly steady flow of other jurisdictions following suit.³ Because of the blurring at the edges, it is difficult to categorically list the characteristics of registered partnerships.

The range of entitlements extended by virtue of registered partnerships varies from jurisdiction to jurisdiction from those that, with regard to partnership entitlements rather than status, provide a high level of equivalence to marriage,⁴ to those that provide somewhat less.⁵

In many instances, the entitlements attached to registered partnership regimes have been limited initially, but have been expanded over time. Such limitations have generally been related to:

- matters of citizenship;

² I have used the term 'registered partnerships' as a generic term to include regimes labelled, for example, registered partnerships (as in Denmark), civil unions (as in New Zealand), civil solidarity pacts (as in France), civil partnership (as in the United Kingdom), life partnerships (as in Germany), etc – see earlier discussion in Chapter 1.

³ For example: Norway – registered partnerships since 1993; Finland – Registered partnerships since 2001 (entry into force 2002); France – Civil Solidarity Pacts since 1999; Germany – Life Partner Registration since 2001; Sweden: Registered partnerships since 1994 (entry into force 1995).

⁴ For example Denmark and Sweden (amongst others) that largely emulate the provision of entitlements available to married partners.

- family issues such as adoption and custody; or
- access to artificial birth technology.⁶

There are, however, some on-going difficulties arising from the differences between registered partnerships and marriage.

Who may register?

In some jurisdictions, registered partnerships are offered to same-sex couples only.⁷ In other jurisdictions, they are available both to same-sex couples and to different-sex couples.⁸

In some jurisdictions, in order to be eligible for a registered partnership, at least one partner must be a citizen of that jurisdiction.⁹ In some jurisdictions there may be a residency requirement.¹⁰ New Zealand has no citizenship or residency requirements for eligibility for entering into a civil union.¹¹

It is worth noting that, in New Zealand, under the Civil Union Act 2004 both same-sex and different-sex couples may enter a civil union. It was stated that to provide civil unions for same-sex couples and to exclude

⁵ For example, the significantly weaker registered partnership model in Slovenia that covers relationship property, reciprocal support rights and obligations, and some inheritance rights.

⁶ For example, the original registered partnerships in 1995 in Sweden did not allow for adoption and required that one partner must be a Swedish citizen. In 200, non-Swedes legally resident in Sweden became entitled to apply for registration; in 2003, registered partners became able to adopt each others children or to adopt non-kin children from within Sweden or from overseas; and, in 2005, lesbian couples gained access to in-vitro fertilisation.

⁷ For example, Denmark, Greenland, Iceland, Finland, Germany, Switzerland, Slovenia, United Kingdom, Czech Republic.

⁸ For example, The Netherlands, France, Luxembourg, New Zealand, Hungary.

⁹ For example, Greenland, Iceland, Finland.

¹⁰ For example, in Denmark, non-citizens may register their partnership if they have lived in the country for two years.

¹¹ The Department of Internal Affairs in New Zealand provides procedures for both New Zealanders who wish to enter into a marriage or civil union overseas, and for overseas persons who wish to enter into a marriage or civil union in New Zealand. See: <http://www.dia.govt.nz> (range of relevant information and forms. (Retrieved: 23 July 2009)

different-sex couples would not be compliant with New Zealand's human rights legislation:¹²

Why does the Civil Union Bill allow for the registration of different-sex couples?

There are two key reasons for including different-sex couples:

- 1. It is imperative from a rights perspective that this recognition model does not discriminate by reason of sexual orientation; and it avoids possible social stigma of being perceived as a "gay" marriage model.*
- 2. It provides a choice that could meet the needs of 230,000 de facto couples, who may wish to be legally recognised, but not as a "married" couple.*

It would be inconsistent with human rights protections to deny different-sex couples access to civil unions as a choice of relationship recognition, by reason of their sex or sexual orientation. The gender of each partner to a relationship is, legally speaking, irrelevant to a vehicle of public recognition and the conferment of statutory entitlements.

And yet, the converse argument has not yet been extended by our lawmakers to the existing Marriage Act 1955.

Adoption and child-related legislation

There has been a wide range of variation with regard to the treatment of same-sex couples and their access to family-related laws. Most jurisdictions have limited same-sex couples' entitlements with regard to adoption, guardianship and custody, and access to artificial birth technology.

There are significant variances in how different jurisdictions have approached the adoption issue insofar as this reaches same-sex

¹² Draft "Proposal for the Legal Recognition of Same-Sex Couples in New Zealand", March 2001, prepared by the Civil Union Committee chaired by Tim Barnett MP.

couples. In some instances the rules were initially restrictive but have subsequently been relaxed. In other instances, these limitations remain in place. For example:

- Denmark originally granted no adoption rights to same-sex couples, but in 1999 extended adoption rights to same-sex couples to enable the adoption by registered partners of each others' children. Adoption of children from outside of the relationship is still not permitted.¹³
- Sweden first introduced registered partnerships in 1995 at which time adoption rights for same-sex couples were limited. Since early 2003, however, same-sex partners have been able to adopt each other's children and to jointly adopt children from outside the relationship. Since 2005, lesbian couples have had access to in vitro fertilisation services.¹⁴
- Iceland passed legislation on 27 June 2006 removing all prior adoption restrictions and providing lesbian couples with the right to fertility treatments.¹⁵
- New Zealand's civil unions do not enable access to joint adoption for registered couples – whether same-sex or different-sex. Under New Zealand law, the Adoption Act 1955 permits single persons to adopt. This enables one partner to a relationship to adopt, and the other partner to 'construct' a legal relationship with the child through guardianship and parenting arrangements – but not joint adoption.¹⁶

Issues such as adoption and other incidents of marriage are extremely important for same-sex couples. For any couple in a committed relationship, there is much more to the relationship than the procedural

¹³ Partners Task Force for Gay & Lesbian Couples, "Registered Partnerships: The Scandinavian Approach": <http://www.buddybuddy.com/d-p-scan.html> (Retrieved: 23 July 2009).

¹⁴ Partners Task Force for Gay & Lesbian Couples, "Registered Partnerships: The Scandinavian Approach": <http://www.buddybuddy.com/d-p-scan.html> (Retrieved: 23 July 2009).

¹⁵ Partners Task Force for Gay & Lesbian Couples, "Registered Partnerships: The Scandinavian Approach": <http://www.buddybuddy.com/d-p-scan.html> (Retrieved: 23 July 2009).

¹⁶ Adoption Act 1955 s.3 and s.4.

aspects of registering the relationship between partners. What is important is the desire to become, and to be recognised as, a family – which may or may not include the presence of children within that family. What is important is the ‘meaning-making’ elements, rather than the procedural, that attach to the core mutual relationship itself.

International recognition

There is wide variation in the recognition by one jurisdiction of a partnership that has been registered in accordance with the laws of another jurisdiction. With different-sex marriages, the presumption is that the marriage of one jurisdiction will be recognised in another. With same-sex marriages, the presumption is still largely untested. With same-sex registered partnerships, the presumption tends to be that they will not be recognised in a ‘host’ country unless express provisions are in place either by way of express legislative provisions or by way of express agreement between jurisdictions. In most instances, the default position is that a registered partnership will not be recognised outside of the country of origin.

The most obvious reason for this is that only a limited number of countries / jurisdictions have such registration regimes and, that even where a country does provide registered partnerships, it may not provide for the recognition of registered partnerships from all or any of the other countries who also provide them. Another reason is that the coverage provided by registered partnerships varies significantly from country to country.

There are some instances of multi- or bi-lateral agreements with regard to mutual recognition of registered partnerships. Some of the Scandinavian countries have entered into agreements to recognise each other’s registered partnerships.¹⁷ For example, Denmark, Norway and Sweden have such an agreement, as do Denmark and Iceland.¹⁸ A

¹⁷ Toner, Helen, *Partnership Rights, Free Movement, and EU Law*, Hart Publishing, Oxford (2004): 45.

¹⁸ Partners Task Force for Gay & Lesbian Couples, “Registered Partnerships: The Scandinavian Approach”, <http://www.buddybuddy.com/d-p-scan.html> (Retrieved: 23 July 2009).

similar bi-lateral agreement is in place between the United Kingdom and The Netherlands.

In other instances, there are specific statutory provisions prescribing what relationships from overseas will be recognised as registered partnerships.

The United Kingdom's Civil Partnership Act 2004 expressly recognises same-sex civil unions registered in the Principality of Andorra, Belgium, Quebec and Nova Scotia (Canada), Denmark, France, Finland, Germany, Iceland, Luxembourg, The Netherlands, New Zealand, Sweden, and California, Connecticut, Maine, New Jersey and Vermont.¹⁹

In some instances, same-sex marriages (from countries where these are possible) are recognised as registered partnerships. For example, the United Kingdom recognises, as civil partnerships, same-sex marriages from Belgium, Canada, The Netherlands, Norway, Spain, South Africa, and some States in the USA.²⁰ It must be noted that different-sex marriages from these same countries are recognised in the United Kingdom as marriages. This raises serious questions about issues of equality with regard to the treatment of same-sex couples as compared with different-sex couples, and arguably constitutes an affront to the dignity of those couples and the laws of the country of origin.

The statutory regulations accompanying New Zealand's Civil Union Act 2004 provide that certain registered partnerships from overseas jurisdictions will be recognised in New Zealand. There are five such relationships, namely:²¹

- registered partnerships of Finland;
- life partnerships of Germany;
- civil partnerships of the United Kingdom;
- domestic partnerships of New Jersey; and
- civil unions of Vermont.

¹⁹ Equality Network, "Civil Partnership In Scotland: What Civil Partnership Means For You And Your Partner" (Questions and Answers on International Recognition), <http://www.civilpartners.org/Equality/Web.nsf/webpages/B4519B8ED16AF4EF8025709400835695?OpenDocument> (Retrieved: 23 July 2009).

²⁰ Equality Network, "Civil Partnership In Scotland: What Civil Partnership Means For You And Your Partner" (Questions and Answers on International Recognition), <http://www.civilpartners.org/Equality/Web.nsf/webpages/B4519B8ED16AF4EF8025709400835695?OpenDocument> (Retrieved: 23 July 2009).

²¹ Civil Unions (Recognised Overseas Relationships) Regulations 2005 cl.3.

It is unclear why some overseas relationships were not included in this list at the time of the passage of the Act – for example, the *Pacte Civil de Solidarite* (PACS) of France, and registered partnerships of countries such as Norway. It is also unclear why further have not been added since the passage of the Act – for example, registered partnerships of the Czech Republic and Hungary. I would suggest that most of these are more alike New Zealand civil unions than are registered partnerships from New Jersey in the United States.

What is pleasing, with regard to the New Zealand recognition of overseas relationships, is that New Zealand has not attempted to recognise same-sex marriages from overseas jurisdictions as civil unions in New Zealand. This does leave open the question as to whether a marriage entered into by a New Zealand same-sex couple in Canada will be recognised as a legally valid marriage under New Zealand law.²²

The fact that there are so many variables with regard to registered partnerships – who can register what entitlements they attract, and what recognition they might or might not receive internationally – all contribute to the sense that they do not easily and adequately provide for equality in treatment between same-sex and different-sex couples. While there may still be some questions with regard to international recognition of same-sex marriages, the equality of treatment within jurisdictions is essentially unquestioned, and the presumption of equality across jurisdictions is very strong.

Summary

Some jurisdictions offering registered partnerships to same-sex couples provide a greater degree of recognition and entitlement than others. However, where registered partnerships are put in place as an alternative to marriage, even where the statutory entitlements that flow from registration are as close as they possibly can be to those that flow from marriage, there is still a failure to provide same-sex couples with

²² See further comment on this point in the following section in this chapter; further comment on the comity of (marriage) laws, in Chapter 8; and, the potential for further consideration of the issue of whether or not same-sex marriages from overseas should be recognised in New Zealand, in Chapter 10.

equality in relationship recognition. Registered partnerships do not provide same-sex couples with the same relationship status that is provided by marriage.

This is not now an issue in countries such as The Netherlands and Belgium where registered partnerships now exist alongside marriage as true alternative choices for both same-sex and different-sex couples. This fact in itself, however, reinforces my view that true equality only exists where both same-sex and different-sex couples have access to both registered partnerships and marriage – not where:

- registered partnerships are offered to same-sex and different-sex couples, but marriage is available only to different-sex couples;²³ or
- registered partnerships are offered to same-sex couples only, and marriage is available to different-sex couples only.²⁴

Neither of these situations is acceptable on an equality basis, and both retain and perpetuate the primacy of heterosexual marriage.

MARRIAGE

So, what is it about marriage that provides what is, arguably, a superior form of relationship recognition as compared with registered partnerships?

Marriage as a fundamental social institution

Marriage is a fundamental social institution, entry into which is seen by the majority of New Zealanders as an expected and natural part of their life journey. Marriage, amongst New Zealanders generally is not seen as a privilege, but rather as a right. This view of marriage is supported in New Zealand law:²⁵

... [the] freedom to marry is rightly regarded as a basic civil right.

²³ As is the case in New Zealand and France, for example.

²⁴ As is the case in Denmark, Finland and Germany, for example.

²⁵ Thomas J in Quilter v Attorney-General [1998] 1 NZLR 523: 537.

In accord with New Zealand human rights legislation, it can be argued that, if marriage is a basic civil right that is extended to different-sex couples, then, in reliance upon the prohibitions against discrimination on the ground of sexual orientation in the New Zealand Bill of Rights Act 1990 s.19, marriage is a basic civil right that should be extended also to same-sex couples.²⁶ To quote Thomas J more fully:²⁷

Based upon this personal characteristic, gays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. In a real sense, gays and lesbians are effectively excluded from full membership of society.

It must be recognised and emphasised, therefore that a discussion about access to marriage for same-sex couples is not only a discussion about relationship recognition but also, and perhaps more importantly, it is a discussion about the place of gays and lesbians within our society.

It is much more difficult for any person to reach full potential as a member of society when being told constantly and consistently that they are inferior to other (heterosexual) members of society.²⁸ Many gay men or lesbian women strive to distance themselves from these negative messages by rising above them. For others, however, the pressures might be too great. In the struggle to reject an identity as societal outcasts, individuals might, for example, resile to the negative messages and turn to prostitution or suicide.²⁹ Alternatively, they might strive to live up to the expectations placed on them – living a lie of heterosexuality when that does not reflect who they are behind that lie.

²⁶ On the basis of the prohibitions against discrimination on the ground of sexual orientation as contained in the New Zealand Bill of Rights Act 1990 s.19.

²⁷ Thomas J in *Quilter v Attorney-General* [1998] 1 NZLR 523: 537.

²⁸ See discussion on the analogy with the Maslow 'Hierarchy of Needs' in Chapter 3.

²⁹ It is thought to be for this reason that many gay youths commit suicide, or enter into male prostitution. This is an area in which very little research has been done to date. There are some narrative writings, for example about teenage gay suicide rates, but very little documented evidence about prostitution. *Outrage* magazine (October 1994:

For society to provide for a lesser form of recognition for same-sex couples than for different-sex couples is to continue to emphasise and reinforce this sense of inferiority, and to validate the pretence rather than the reality. For society to recognise the equal worth of gay relationships is for society to validate the existence of a large number of persons within its midst, enabling them to contribute in a more proactive, positive, constructive way to that society rather than in a reactive and destructive way, expending energy to combat the negative.

The legal recognition of same-sex relationships by marriage underpins the more personal issues of acceptance, of self-esteem, and pride. It is this which is perhaps the most important contextual theme of this thesis.

The marriages of different-sex couples, and families based on the heterosexual ideology, **are** privileged by the law. Such relationships are established as the norm by those who seek to perpetuate this privilege, and relationships that are different are consequently portrayed by them as abnormal, or at least inferior.

It would be possible to cite a multitude of examples where same-sex couples point to particular aspects of their lives, or particular events in their lives, to demonstrate either the inequality that arises out of an inability to access marriage, or to symbolise the role of relationship validation in providing a sense of social belonging.

On 3 January 1996, Jenny Rowan and Jools Joslin held a wedding ceremony in Wellington.³⁰ Jenny and Jools have been staunch advocates of the view that only marriage, in exactly the same form as is offered to different-sex couples, is adequate for same-sex couples. Their reasons for this are founded in the equality principle, and in the fact that they, having raised children together, having owned property together, and having lived in a committed and loving relationship for some 12 years, were aware of the inadequacies of protections for same-

38) states that "[a] recent American survey found that nearly 30% of the young gay men and lesbians surveyed had attempted suicide".

³⁰ Jenny Rowan and Jools Joslin were subsequently parties to the Quilter same-sex marriage case in New Zealand – first to the High Court in Auckland in April 1996, then to the Court of Appeal in September 1997, and (as Joslin v New Zealand) to the United Nations Human Rights Committee in December 1998.

sex couples under the law. Jools' response to a suggestion that registered partnerships would cater for same-sex couples:³¹

Absolutely ghettoising. It would create a legal partnership, or a piece of legislation around a partnership, that is specifically for same-sex couples. ... They're saying that it could include heterosexual couples as well, but that's not why it's being created. I think that, if registered partnerships happen in this country, it puts us back immediately. It says that the best way to cope with this group of people, who we all feel a bit uncomfortable about, is to have separate legislation.

On 12 February 2001 ("Freedom to Marry Day") a pro-same-sex marriage protest about the unequal treatment of same-sex couples was held in Chicago, Illinois. Those involved in the protest stated that:³²

The ban [on same-sex marriage] is government-sanctioned second class citizenship to all same-sex couples ... They refuse to extend a basic human right to a whole class of people ... there are a host of typical benefits from marriage – access to partner's health care, social security and pension survivors' benefits, adoption rights, immigration rights, etc – which should be of concern to all those who support equal justice. ... The reality is that even in western societies, marriage has changed ... The institution of marriage has evolved to respect the rights of individuals and of couples, and ... must expand to encompass ... individuals of the same gender. Anything else is to accept the position that same sex relationships are less valid than those of a man and a woman.

On changing his surname, by deed poll, to that of his partner of 17 years, James Macky, wrote:³³

Within our close-knit family circles Kim and I had been recognised and accepted as a couple for nearly 17 years. Two major family trees, one from each side of our families, list us with that little equals sign that is genealogical shorthand for a married couple.

Work colleagues, neighbours, everyone knew exactly what we meant to each other. Surely we had nothing to prove to anyone. So why was it that now, after so many years together, I'd decided to take his name. ...

³¹ Matthews, Richard, "Partners In Crime": Bringing Same-Sex Marriages Out Of The Closet", in *NZ Listener* (18 September 1999): 30.

³² Chicago Anti-Bashing Network (CABN), "Two Face Felony Charges For Protest For Gay Marriage", Press Release (17 February 2001).

...from our earliest childhood we're told fairytales that emphasise the marriage rite as life's major milestone. However, celebrating this milestone becomes problematic for many couples because of the narrow definition accorded to those suitable to undergo this magical, transforming ceremony.

... the new birth certificate ... is nothing like a marriage certificate ... [b]ut ... it will have to do until the real thing comes along.

Public acknowledgement and support

Many gays in long-term relationships feel a need to publicly seal that bond. Of course, opponents of the idea of same-sex couples gaining access to existing marriage law will no doubt say that same-sex couples are free to hold commitment ceremonies and to “announce” to family, friends and colleagues, their commitment to each other. And, in fact, this does happen.

Each of the couples involved in the New Zealand Communication to the United Nations Human Rights Committee did get married, in the sense that they have held commitment ceremonies – these ‘marriages’, of course, were given no legal recognition.

Writing about the ceremony between herself and her partner, Lindsay Quilter (now Lindsay Zelf) said:³⁴

In August 1994, we stood up in our living room, before our chosen community (friends, family and cats) and asked them to witness our commitment to each other as a monogamous couple, and to support, honour and, if necessary, protect our relationship. Like many other couples, we discovered that private vows of love, truth and support for ourselves and for each other strengthened the bond between us. Paradoxically, they also gave us more room for personal growth and for independent exploration, both in our relationship, and of friendships and interests outside it.

For each gay man or lesbian who “comes out”, there is a similar “coming out” necessary for anyone who cares for them. Making our private vows publicly, before our own community, gave each of them the opportunity to acknowledge their own courage, loyalty and love and to see themselves not standing alone.

³³ Macky, James, “Private Lives”, Metro (September 2000) 90: 92 and 97.

³⁴ Quilter, Lindsay, “Going For Our Lives: ‘By The Power Vested In Me ... I Now Pronounce You Man And Wife...’ – A Personal View Of Legal Same-Sex Marriage”, An Essay (1996).

Barbara McDowell and Gail Donnelly, and Joe Bourassa and Kevin Varnell married on 14 January 2001. They did not apply for a marriage licence, but rather announced their intention to marry through the 'reading of the banns' in their church – the Metropolitan Community Church in Toronto. The church subsequently issued the couples with a marriage certificate, as is generally permitted of churches by Canadian law, and the couples proceeded to submit their marriages for registration with the Province of Ontario. Registration was refused and the couples turned to the courts to declare their marriages legally valid.³⁵

Barbara McDowell wrote about her marriage:³⁶

It was truly a wonderful moment. We were surrounded by so many people who love and support us in being who we are. They came from all walks of life. Our friends, both straight, gay or transgender were there to celebrate with us. We felt amazingly blessed.

Kevin and Joe had previously held a commitment ceremony but they wished to become legally married because, in Kevin's words:³⁷

Unless we can have the full status as a married couple, it's hard to get full recognition of our relationship in the eyes of the community, in the eyes of our family, in the eyes of some of our friends. We have had a holy union, but that's a half measure, and to us half measures are not enough. Already we've noticed a change in people's attitudes towards us, even people who have been with us on this journey from the beginning and who witnessed our holy union relate differently to us now. My parents for instance, took extra steps to come from a small town and my mother who is in her 70s, made a big effort to find a baker that would make a wedding cake with two grooms on the top ... So that's why this wedding and a legally recognized marriage is so very important to us. It allows us to be viewed differently, to be fully recognised alongside all other Canadians.

In talking of the first legal same-sex marriages, and the success in

³⁵ See discussion on the Canadian marriage cases in Chapter 8.

³⁶ McDowell, Barbara, "The Importance Of Being Married", http://cangay.com/relation/partner/barb_gail.htm (Retrieved: 20 February 2001).

human rights and equality terms that surrounded them, Joanna Radbord wrote:³⁸

All of the couples emphasized that the denial of the freedom to marry stigmatized gay and lesbian relationships. It promoted a culture of intolerance. "[M]arriage ... is the institution that accords to a union the profound social stamp of approval and acceptance of the relationship as being of the highest value". The denial of marriage sanction treated the relationships as inferior to those of different-sex couples. ...

We argued that only full inclusion in marriage would promote substantive equality. If we won equivalent rights and obligations, but were denied the status of marriage itself, the case would be lost.

The above are all examples of couples saying that merely being in a relationship and being aware of that relationship only as an insular couple is not enough. Being in a relationship and not expressly sharing that fact with others is the parallel for a couple, to being closeted as an individual. There is no opportunity for the couple to share that relationship with others, to celebrate that relationship with others. The fact that the couple does not see fit to share their relationship with others might convey negative messages about the couples own perception of their relationship – suggesting perhaps that they are ashamed of the relationship and, therefore, of who they are as people.

It is a further element of the public nature of marriage ceremonies that, not only is the couple entering a marriage saying to family, friends and colleagues (and society at large) that “we are a couple and wish to be treated as such”, but also they are giving to those persons gathered around them an opportunity to offer support. It is common, at a wedding ceremony, for the celebrant calling upon those present to make a pledge to support the couple through times of need, to be there for the couple in stressful times and to share with the couple in their times of celebration and joy.

³⁷ Jean, “Two Men Who Were Married”: <http://cangay.com/relation/relationship.htm> [Note: Surname withheld from original document for reasons of anonymity] (Retrieved: 20 February 2001).

³⁸ Radbord, Joanna, “Lesbian Love Stories: How We Won Equal Marriage In Canada”, in [2005] 17 *Yale J.L. & Feminism* 99: 120, quoting: MacDougall, B., “The Celebration Of Same-Sex Marriage”, in (2000) 32:2 *Ottawa Law Review* 235: 242. It

To relegate same-sex couples to invisibility, or to a different or lesser status, is to say to those couples “we do not, as a society, consider your relationships to be as valid and as valued as particular other types of relationships”.

Brent Hardinger, writing as a guest columnist in a USA newspaper, summed up this concept:³⁹

Our ceremony, held on a beach on Vashon Island, was intentionally simple. We sang songs, a few friends spoke and, yes, we did kiss. Then Michael and I spent the whole evening listening to friends and family tell us how honored they were to have been invited. Couple after couple, gay and straight, also told us they considered our relationship to be a role model for their own.

A role model? That’s when it finally occurred to us. We didn’t need to tell our friends and family how important we are to each other. They already knew.

That’s also when I learned a profound truth about weddings. They aren’t about the couple saying anything to friends and family. They’re about friends and family saying something to the couple, telling them that they’re valued and appreciated, an important part of the community.

When Michael and I got married, it made our family, and our community, that much stronger.

These are not just mere musings about marriage. These are the voices of people who have experienced commitment ceremonies or who have lived their lives as partners, visible to their friends and communities. All communicate the message that a marriage ceremony is not only about the vows of commitment between the couple, but also it is about the public expression of that commitment.

Couples can live together in committed relationships without publicly signifying their commitment. However, receiving the sanction of family and friends adds a significant layer of support that is not available

is interesting to note that this same passage was quoted in: Halpern v Canada (Attorney-General) (2002, 60 O.R. (3d) 321 (Div.Ct.): para.188.

³⁹ Hartinger, Brent, “Ceremonial Wedding Of Gay Partners Affirms Values Of Family, Friends”, Tacoma News Tribune (4 March 2001).

otherwise. Receiving the sanction of society at large, through official and legal recognition of the marriage adds a further layer of support, and a vital symbol of value and validity.

The “meaning-making” capacity of marriage

The above examples illustrate that relationships are about much more than practicalities and technicalities. Personal relationships between a committed, loving and caring couple are about the intimate bonds formed between two people. It is the significance of the relationship at this intimate level which is ignored when the law only recognises same-sex relationships for the purposes of clarifying the rights of one partner as compared with the rights of the other.

In the discussions following the decision in Baker v State of Vermont,⁴⁰ and prior to the decision of the State Legislature of Vermont to legislate for civil unions (their form of registered partnerships), Will Rountree added the following to the discussion:⁴¹

... most importantly ... the court opened the door to a separate but equal institution that will do nothing to change the symbolic construction of marriage as a heterosexual institution. While the decision mandates a legal structure for same-sex couples through domestic partnership or “marriage lite” arrangements, in opening the door to this separate legal structure, the court ignores the unique meaning-making power of marriage in constructing visions of intimate commitment. Domestic partnership arrangements just don’t, and won’t, have the same meaning-making capacity, and thus “separate but equal” claims are just a charade.

It is, for gays, the ‘meaning-making capacity’ of marriage that is perhaps the most important element of the battle for same-sex marriage.

⁴⁰ Baker et al v State of Vermont et al 744 A.2d 864 (Vt.1999).

⁴¹ Will Rountree (University of California, Berkeley) commenting on the Vermont same-sex marriage judgment by e-mail to a same-sex marriage newsgroup (marriage@lists.qrd.org) (4 January 2000), cited in: Christie, Nigel C., “The New Zealand Same-Sex Marriage Case: From New Zealand To The United Nations”, in Wintemute, Robert, and Andenaes, Mads, Legal Recognition Of Same-Sex Partnerships: A Study Of National, European And International Law, Hart Publishing, Oxford (2001): 335.

Equality under the law is not only about gaining access to equal laws relating to, for example, procedural issues (how to get married), property protections, employment benefits, family and parental rights and obligations, and so on. Equality under the law is, for myself and my partner, being able to conduct our day-to-day lives in the same manner as the people next door. It is being able to do this because the law says that each of us as an individual, and the two of us as a couple, are equally respected by the law, are equally valued as citizens of the country in which we live, and our relationships are equally as valid as our heterosexual counterparts.

Dr Margrit Eichler, a sociologist who furnished an affidavit to the Halpern case, wrote:⁴²

“Marriage” is imbued with unique cultural meaning that cannot be replicated by some other means of partnership recognition. Given the history of oppression of gay and lesbian people, the denial of the freedom to marry perpetuates and promotes stigma and invisibility. The creation of a separate regime marks lesbian and gay relationships as inherently different from and inferior to the relationships of heterosexuals.

Jodi O’Brien writes:

Culturally, we are saturated with the notion that marriage is truly the pinnacle of inter-relational attainment (the “happiest moment of your life”). Given similar acculturation, it stands to reason that many lesbians and gay men would grow up desiring the same cultural rites of belonging.

Of course statutes other than the Marriage Act are important, whether they relate to Accident Compensation insurance, or the ability to write a will which will be upheld by the courts, or any other of a myriad of possible provisions. The importance of these pieces of legislation is what each one of them does individually. What is really important is the picture that is painted over-all, and whether this is a picture of inclusion, or a picture of exclusion – the picture that same-sex couples can and do play an integral and vital part in the community as a whole.

Specific pieces of legislation, such as the Property (Relationships) Act 1976, outline the rights of individuals vis-à-vis one another. Such

⁴² Eichler, Dr Margrit, Affidavit sworn 15 November 2000, in Halpern v Canada (Attorney-General) Court File No.684/00: 266-277.

legislation does not provide a recognition of the relationship of each partner with the other. That is, much legislation (such as the Property (Relationships) Bill 1976) formulates what my individual property rights are **in competition with** the individual property rights of my partner. Furthermore, this particular piece of legislation is about the end of a relationship for which the law has not yet recognised the beginning.

Civil unions, as instituted in New Zealand from 26 April 2005, do provide a means of formal recognition of the relationship, and a range of entitlements that attach to that relationship. Civil unions at least serve to recognise the core relationship between the two partners. However, they do this by maintaining the separation between civil unions and marriage – and consciously and deliberately so by the very Government which promoted and enacted them. In this context, the picture that the existence of civil unions paints is one of exclusion.

With regard to relationship recognition, equality under the law is not about finding some other way to provide same-sex couples with as many of the same entitlements, protections, responsibilities that we can without providing them with civil-legal marriage. No matter how closely the ‘other way’ might imitate existing civil-legal marriage, it is not civil-legal marriage. By the very existence of the two regimes – side by side – there is unequal treatment.

The importance of inclusion in marriage is that it is such an all-embracing, cultural and social institution that does carry such a significant level of meaning for and within society.

The benefits associated with marriage

As mentioned previously, it is not my intention in this thesis to debate whether or not marriage is an anachronistic institution or an institution that, historically, has been oppressive towards women. The fundamental focus is equal access, for those same-sex couples who desire such access, to marriage and the entitlements and status associated with being married. Above all, the issue is whether those who are able to marry are conferred with a unique status that is not available to those

who are not able to marry, and whether same-sex couples are deserving of access to that status on the basis of full and equal treatment before and under the law.

It is worthwhile, therefore, to summarise some of the advantages and disadvantages that attach to marriage.

There are some benefits, previously available only to married couples, that are now available to de facto partners, whether same-sex or different-sex. These include, for example:

- (1) the protection of individual financial interests during, and at the conclusion of, a relationship;
- (2) the sharing of joint financial interests at the conclusion of a relationship;⁴³ and
- (3) recognition of de facto partners for the purposes of various legislation.⁴⁴

In addition to those benefits, there are further benefits that can now be attained by same-sex couples and different-sex couples who enter into registered partnerships. These include, for example:⁴⁵

- (1) the conferral of a recognised relationship status upon a civil-legal registration conducted in accordance with the relevant legislation; and
- (2) the possibility of ceremonies associated with the registration process which serve to reinforce the status and, consequentially, the stability of the relationship in the eyes of the couple themselves, as well as their families and friends.

At the same time, there are some benefits that can only be attained from gaining access to marriage. Being married is like being a member of a 'club'. Membership of the married couples' club is, by definition, only available to couples who marry and, by extension, is only available to

⁴³ For example, in New Zealand, relationship property for partners in de facto, civil union, or marriage relationships is covered by the Property (Relationships) Act 1976.

⁴⁴ For example, theft of property by a partner – Crimes Act 1961 s.222.

⁴⁵ Lesbian and Gay Legal Rights Service, "The Bride Wore Pink", in [1993] 3 Australasian Gay and Lesbian Law Journal 67: 90-91.

those who can to marry. While other regimes may try to emulate the benefits of membership of the marriage club, exclusion means that those benefits do not carry the same meaning. There are some benefits that truly derive only from the status of being married and are therefore available to different-sex couples only. These include the following:⁴⁶

- (1) Social recognition and reduced discrimination – Public recognition and support, from family friends and the community, to same-sex couples in the context of the long-standing, socially- recognised institution of marriage. That is, access to marriage for same-sex couples provides recognition in the context of equal status with different-sex couples – not in the context of a second-rate, ‘inferior’ status. This colours the way in which family friends and community view the validity and value of the relationship.
- (2) Enhanced self-esteem – Same-sex couples already have every right to feel proud of themselves and their relationships. However, in many cases this pride may reside in the fact that they have worked hard to establish or maintain a relationship in the face of social prejudices. Greater self-esteem can come from being recognised as successful in a socially approved and respected marriage relationship.
- (3) Choice – The State prescribes, through its laws, the types of relationship recognition that are available to its citizens. There is no specific ‘freedom of choice’ provision within New Zealand law, however, based on the premise that the State cannot treat citizens less favourably on the grounds of an irrelevant characteristic, it is possible to argue that limiting the choice of form of relationship recognition is discriminatory. All couples, whether same-sex or different-sex should freely have the choice of remaining in a de facto relationship or entering into a civil union or a marriage. Same-sex couples should not be restricted only to those forms of relationship recognition that others deem to be suitable for them.

⁴⁶ Lesbian and Gay Legal Rights Service, "The Bride Wore Pink", in [1993] 3 Australian Gay and Lesbian Law Journal 67: 90-91.

- (4) Status – Being provided with access to marriage means that, if same-sex couples have cause to interact with agencies of the State, they do so on the same basis as different-sex married couples, not as members of an ‘other’ category, such as being partners in a registered partnership. This equivalence in status can affect the perception of officials dealing with the couple in areas such as immigration, human rights, and family law.⁴⁷

Conversely, there may also be some disadvantages that flow from recognition through marriage. In the main, these disadvantages would not be specific to same-sex couples, but apply to different-sex couples also. For example, the disadvantages might include the following:

- (1) The presence of different types of relationship recognition tends to create a hierarchy in how those relationships are viewed. Historically, for example, *de jure* marriages were seen as the only ‘proper’ relationships, with *de facto* relationships – or informal relationships in the nature of marriage – being viewed illegitimate.⁴⁸ As *de facto* relationships have become more common, they have continued to be viewed as inferior to marriage relationships. It is likely that, with the advent of civil unions, relationships will fall into three categories – *de facto*, civil unions and marriages – with marriage retaining a superior and privileged social status.
- (2) Some same-sex couples who have argued against marriage have based their argument, at least in part, on the view that marriage creates an implied obligation to support and, as a result, Government would reduce access by individual partners to social assistance benefits. I suggest that this is a somewhat flawed argument. First, in New Zealand social assistance legislation has been amended to take account of civil unions and *de facto*

⁴⁷ I have already alluded to the difference in treatment that occurs in practice between same-sex and different-sex *de facto* in the case of immigration. There is no reason to expect that the same differences in treatment will not occur in practice with regard to couples in registered partnerships as compared with marriage.

⁴⁸ Note that the term ‘*de jure* marriage’ refers to a marriage solemnised in accordance with the laws of marriage, whereas the term ‘*de facto* marriage’ refers to a marriage-like relationship that exists in fact or reality, but not in accordance with marriage laws.

relationships.⁴⁹ Second, rights are not conferred in isolation – rights occur in the context of reciprocal responsibilities.

I consider that the most important point to remember is that the whole issue of access to marriage by same-sex couples is a rights-based issue and is a principled matter of equality under the law. In this sense, while it is accepted that there may be some individual advantages and disadvantages, these are secondary to the primary goal, and that the over-all advantage to be gained for the gay individual, the gay couple, and the gay community as a whole would far outweigh any disadvantages that may eventuate.

The ‘presumption’ that is marriage

Same-sex couples, are not seeking ‘special’ rights but rather are seeking access to the same rights that different-sex couples take for granted.

There is a presumption of inclusion that flows from marriage – that is, inclusion within the provisions of other legislation. A prime example of this is the presumption of inclusion in relation to adoption legislation.⁵⁰ There are two scenarios that are of interest in this context:

- First, there is the scenario in which same-sex couples have not been granted access to marriage, although they may have been granted access to civil unions.
- Second, there is the scenario in which same-sex couples have been granted access to marriage under the existing marriage legislation – that is, on precisely the same terms as different-sex couples.

I will now examine how addressing the issue of same-sex couple adoption might differ under each of the above scenarios.

⁴⁹ And again, as a result of the Civil Union Act 2004 and the Relationships (Statutory References) Act 2005, same-sex couples were recognised in social assistance legislation after a period of 2 years from the Civil Union Act coming into effect. The “grand-parenting” period was designed to enable those same-sex couples affected by the change to rearrange their financial affairs.

⁵⁰ I discuss the current situation in New Zealand with regard to the ability of same-sex couples to apply to legally adopt children, in Chapter 6.

When same-sex couples are not able to marry

To date, the tentative, inconclusive, and inconsequential reviews of adoption law in New Zealand have taken place, considering amongst other issues, whether or not same-sex couples should be permitted to apply to adopt.⁵¹

If we accept that the current interpretation of adoption law is that only couples who are legally married can adopt jointly,⁵² the presumption would be that same-sex couples would not be able to adopt jointly, because same-sex couples are not able to marry.

In essence, therefore, the presumption is one of exclusion.

As same-sex couples are currently not able to marry, the presumption of exclusion would have to be rebutted by robust policy considerations based, for example, on the paramount interests of the child rather than dubious assumptions about same-sex couples.

When same-sex couples are able to marry

Let us now assume that same-sex couples are able to marry in New Zealand. In this case, because married partners are spouses by definition, the presumption would be that same-sex couples would be able to lodge jointly an application to adopt – provided they have married.

In essence, therefore, the presumption is one of inclusion.

⁵¹ (1) New Zealand Law Commission, “Adoption and Its Alternatives: A Different Approach and a New Framework”, NZLC R65 (September 2000). The recommendations of the Law Commission have not been adopted by subsequent Governments.

(2) “Inquiry Into New Zealand’s Adoption Laws”, the Report of the Government Administration Committee (August 2001). The Report of the Committee was inconclusive and resulted in no recommendations to Parliament.

(3) In 2005, an officials working group, led by the Ministry of Justice, was established to consider adoption law reform. No Cabinet decisions have been made as a result of this work.

See further discussion on these in Chapter 8, and further comment on the adoption issue in Chapter 9.

⁵² Currently, the Adoption Act 1955 s.3 permits joint applications for adoption to be lodged only by spouses. The term “spouse” has generally been interpreted to include

In this case, any reversal of the presumption would have to be achieved by the demonstration of a substantive reason why same-sex couples should not be able to adopt.

Summary

As discussed in Chapter 2, human rights is fundamentally about equality and inclusion – citizenship is about full participation. Therefore the presumption of inclusion that flows with the ability to marry, is centrally important to same-sex couples both at a practical level and as a matter of principle.

Although I have used adoption as an example, this same principle applies in relation to other areas of the law and, indeed, to other areas related to marriage. For example, inclusion in marriage means, presumptively, feeling the same sense of social belonging and status that is already felt by those couples who can marry.

WHO CAN AND CANNOT MARRY?

With regard to who is or is not permitted to marry, there are various anomalies that arise both within the New Zealand jurisdiction, and between the New Zealand and overseas jurisdictions. In general terms, persons are permitted to marry if:

- they demonstrate that they have mental capacity to freely consent to the marriage;
- are of the requisite age to be able, by law, to give consent, or that they have a parent or guardian prepared to give consent on their behalf;⁵³

only married couples, although there has been a recent development in this area. See Chapter 8 for more detailed consideration.

⁵³ Marriage Act 1955 s.17 provides that no person under the age of 16 may get married. Section 18 provides that, apart from specified exceptional situations, minors require the permission of parents to marry. By virtue of these two provisions, although the Act does not expressly provide, the age of consent to marriage in New Zealand is eighteen years. The form “Notice of Intended Marriage” (BDM 60) is a prescribed form under the Marriage (Forms) Regulations 1995.

- they are not too closely related to each other by blood (consanguinity) or familial relationship (affinity);⁵⁴
- they are not currently married (or, in New Zealand, in a civil union); and
- they are not of the same gender (as confirmed, in New Zealand, by the Court of Appeal).⁵⁵

The anomalies that arise, with regard to how different couples might be treated by the same laws relating to marriage, generally mean that same-sex couples are treated differently and less favourably than their different-sex counterparts.

Some citizens of New Zealand cannot marry in New Zealand

Same-sex couples cannot enter into a valid civil-legal marriage in New Zealand. In Chapter 4 I will discuss the limits on citizenship that result from exclusion of equal participation in society, but, obviously, marriage carries with it a social status that is denied those who cannot marry. The birth of each person in New Zealand is registered with the State and a birth certificate is issued. By virtue of that birth certificate and the provisions of the Citizenship Act 1977 s.6, the person whose name appears on that certificate is a citizen of New Zealand.⁵⁶ In the same way as others in the community we, as gay and lesbian individuals, act as ‘good’ citizens in our daily lives – at home, socially and at work. Arguably, however, we have our ‘citizenship’ limited to the extent that we are denied participation in one of the key institutions of our society.

⁵⁴ Marriage Act 1955 s.15 and Schedule 2.

⁵⁵ The Court of Appeal in *Quilter v Attorney-General* [1998] 1 NZLR 523 (Court Of Appeal) having held that marriage can only take place between a man and a woman.

⁵⁶ Citizenship Act 1977s.6 provides:

6. Citizenship by birth:

(1) Subject to subsection (2), a person is a New Zealand citizen by birth if —
(a) the person was born in New Zealand on or after 1 January 1949 and before 1 January 2006; or
(b) the person was born in New Zealand on or after 1 January 2006, and, at the time of the person's birth, at least one of the person's parents was —
(i) a New Zealand citizen; or

In this case, the fact that we are not permitted to marry is a limit on our citizenship – our “full participation in society”.⁵⁷

‘Bad’ citizens of New Zealand can marry

At the same time that we, as ‘good’ citizens, are denied access to marriage, because marriage is reserved for different-sex couples, certain other persons are permitted to marry in New Zealand.

One of these groups of persons includes those who could be considered ‘bad’ citizens. For example, people who have committed significant crimes and have been cut off from society by being sent to prison are still not denied the ability to marry. Men who have been imprisoned as a result of being charged for assault against their wives are not denied their existing marriage, or even the ability to re-marry even if one marriage has failed because of their perpetration of abuse. Men who have abused children are not denied the ability to marry. Marriage is seen as such a fundamental right that it cannot be taken away from any of these persons. However, it is not a right that currently can be extended to same-sex couples in New Zealand (or many other countries) because their inclusion might be seen to “besmirch” the sanctity of marriage.⁵⁸

Overseas citizens can marry in New Zealand

New Zealand has also become a destination of preference for many overseas different-sex couples to get married. There is a significant business within New Zealand around organising weddings and wedding functions for couples who travel to New Zealand specifically for the

(ii) entitled in terms of the Immigration Act 1987 to be in New Zealand indefinitely, or entitled to reside indefinitely in the Cook Islands, Niue, or Tokelau.

⁵⁷ Thomas J, in *Quilter v Attorney-General* [1998] 1 NZLR 523: 537.

⁵⁸ New Zealand Law Commission, “Editorial: Recognising Same-Sex Relationships” (December 1999).

‘wedding experience’.⁵⁹ The couples, generally accompanied by members of their families, come to New Zealand and are able to marry under New Zealand law safe in the knowledge that their marriage will be recognised without question in their home country.

However, same-sex couples who are citizens of New Zealand cannot marry in their home country.

Some citizens of New Zealand can have ‘recognised’ marriages overseas

Different-sex couples who travel away from New Zealand are able to marry overseas and, without having to undertake any particular formality in accordance with New Zealand law, have that overseas marriage recognised without question in New Zealand.

It is our contention that this same principle should apply to same-sex couples. Same-sex couples, who are citizens and normally residents of New Zealand, have legally married in overseas jurisdictions where same-sex marriages are possible. The issue of recognition of these marriages by New Zealand has yet to be tested. However, we can say with some certainty that their recognition is certainly not ‘without question’.

Brothers and sisters

Another way to highlight inconsistencies in treatment between same-sex and different sex couples is to consider the situation where, hypothetically, a brother and a sister each travel with their male partners from New Zealand to an overseas country and, while there, each couple gets married.

This raises the same issues as above, but tends to crystalise them somewhat. When the different-sex couple (the sister and her husband) arrives back in New Zealand, the fact that they are married is accepted without question. They would probably not, in most circumstances be

⁵⁹ For example, a ‘traditional’ Maori Wedding: <http://www.maoriweddings.co.nz/> (Retrieved: 29 July 2009); or “The Wedding Of Your Dreams”, as advertised at:

asked to produce a marriage certificate, but if they were asked to do so at any point, their marriage would be accepted, *prima facie*, as a legal, valid marriage for all purposes within New Zealand.

Conversely, when the same-sex couple (the brother and his husband) arrives back in New Zealand it is unlikely that the couple would, without question, be accepted as being married – especially at an official level. Even if they were to produce their marriage certificate, it would not be accepted without question as proof of a legal, valid marriage for all purposes within New Zealand. Their marriage would not be accepted, *prima facie*, as a legal, valid marriage for any purpose within New Zealand.

Only wealthy gay people can marry

Apart from the question as to whether or not overseas same-sex marriages would be recognised in New Zealand, a further consideration associated with same-sex couples marrying overseas is that of affordability. If same-sex marriages from overseas jurisdictions were to be recognised in New Zealand, but marriage was not to be extended to same-sex couples, a new class of persons, and arguably a new form of discrimination, would be created. Marriage would only be available to those same-sex couples who were able to afford to travel from New Zealand to another country where same-sex marriage is possible in order to get married. On the basis that different-sex couples can marry in New Zealand, without needing to travel overseas, they would not be faced with this obstacle.

Summary

In summary, a number of anomalies arise from the inability of same-sex couples to marry in New Zealand. Some of these anomalies exist by virtue of inconsistencies in the treatment of same-sex couples as compared with different-sex couples with regard to New Zealand domestic laws. Some of them exist by virtue of inconsistencies in the

<http://www.poronui.co.nz/Home/Events/Weddings.aspx> (Retrieved: 29 July 2009).

treatment of same-sex couples as compared with different-sex couples with regard to the portability of marriage laws from overseas jurisdictions – although this latter issue has not yet been fully tested in New Zealand at this stage.⁶⁰

INCREMENTALISM

During the lead-up to the passing of the Civil Union Act 2004, a variety of reasons were given for seeking civil unions rather than marriage:

- New Zealand society was not yet ready to accept same-sex marriage.
- Seeking civil unions was a politically pragmatic option in terms of being able to get the majority of the votes in the House to pass the legislation.
- Seeking civil unions was also a politically pragmatic solution in terms of Members of Parliament being able to support this without running the risk of being voted out at the next election.
- Civil unions would serve to achieve access to a range of legislative entitlements, protections and responsibilities that were not currently available. It would likely take longer to gain access to these if we were insistent on seeking access to marriage.
- It was also made clear that civil unions were seen as a means of achieving ‘increased compliance with’ the imperatives of our domestic human rights laws and our obligations under international human rights laws.⁶¹

⁶⁰ See discussion on options for future action in Chapter 10.

⁶¹ On the Beehive Website, in a section “Questions And Answers On Civil Union And Relationships (Statutory References) Bill”: “Why is the government promoting these two Bills? The law differentiates between people in committed, exclusive and stable relationships depending on their marital status, with a number of legal rights and responsibilities accessible only to married couples. These potentially discriminatory laws expose the government to risks of complaints to the Human Right Commission (HRC), cases before the Human Rights Review Tribunal and litigation. It isn’t fair to deny legal rights to people unable to marry, and establishing civil union in legislation means that Parliament, rather than the judiciary, determines relationship law for New Zealand”; and, “Why are different sex couples able to choose to marry or enter a civil union? Civil union is a new form of recognised relationship. In developing the Civil Union Bill the government is subject to the anti-discriminatory standards set out in human rights legislation. There is no justification for discriminating in the Civil Union Bill between different and same sex couples. In

However, in addition to all the above reasons, or in a sense as an extension of the above reasons, it was suggested, by proponents of the civil union legislation, that civil unions should be seen in two ways:

- as a form of relationship recognition in their own right – for those who did not wish to seek relationship recognition through marriage; and
- as a politically achievable form of relationship recognition that would act as a ‘stepping-stone’ to full and equal recognition through marriage.

That is, it was suggested that access to civil unions, in the first instance, would serve as a means of demonstrating to society at large that formal State recognition of same-sex relationships would not cause the breakdown of New Zealand society that some opponents predicted. Subsequent to showing that ‘the sky has not fallen in’ society would be more accepting of a move to full equality through marriage.

However, an incrementalist approach with regard to human rights issues, and the protection of minority rights, is somewhat questionable.

The failure of incrementalism

It is my view that incrementalism is not part of the language of (civil and political) human rights. In this sense, I describe equality as a ‘destination’ and not a ‘journey’. In support of this view, I make the following points:

- The language of international laws on civil and political rights provide that such rights are immediately enforceable.⁶²

addition, some different sex couples may wish to have their relationship legally recognised but not marry” (Dated: 21 June 2004; Retrieved: 30 July 2009).

⁶² The International Covenant on Civil and Political Rights (ICCPR) Article 2(2) provides: “Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary **to give effect to** the rights recognized in the present Covenant”; whereas the International Covenant on Economic, Social and Cultural Rights (ICESCR) provides: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view **to achieving progressively** the full realization of

- There is an inherent difficulty with notion of “degrees of equality”,⁶³ or of being ‘partly equal’ – surely, being equal cannot mean not being equal.⁶⁴ While I acknowledge that the concept of equality is not a simple concept, and it is necessary to take into account wider considerations such as ‘formal’ equality (essentially, equality of treatment) as compared with ‘substantive’ equality (essentially, equality of result), I still consider that, fundamentally, equality is about being the ‘same as’ rather than being, in any way, ‘different from’.
- Similarly, based on this same reasoning, I have difficulty with the notion of having increasing levels of equality – being more equal today than was the case yesterday.

In subsequent chapters, I will show how it has been common practice to incrementally increase legislative ‘coverage’ to same-sex couples.⁶⁵ As the State incrementally extends the number of statutory provisions that include same-sex couples (and de facto different-sex couples), it is possible to argue that these couples are being provided for in a way that does not undermine traditional marriage. Essentially, the argument is that as same-sex couples are enabled to access, by other statutory means, an increasing number of the specific entitlements that flow from marriage, there is less need for same-sex couples to be able to marry. This argument runs counter to the fundamental equality argument central to this thesis.

Different-sex couples in New Zealand have chosen different ways to arrange their private lives. Over time, the laws of New Zealand have changed to provide greater levels of recognition for these different arrangements. De facto different-sex couples, once placed outside the law, are now recognised to a far greater extent than ever before.⁶⁶

the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative” (Emphasis added).

⁶³ See the Human Rights Commission submission to the Ministry of Justice on the Ministry’s Discussion Paper on “Same-Sex Couples and the Law” (April 2000).

⁶⁴ For example, a simple dictionary definition of equality is: “being the same in quantity, size, degree, value, or status”: Soanes, Catherine, and Stevenson, Angus, Concise Oxford English Dictionary, 11th Edition, Oxford University Press, Oxford (2004): 481.

⁶⁵ See particularly, the discussion in Chapter 8 on the Civil Union Act 2004 and the Relationships (Statutory References) Act 2004.

⁶⁶ Significant recognition for the rights of partners in de facto relationships came with the advent of the Property (Relationships) Act 2001 and, more recently, with the Relationships (Statutory References) Act 2005.

Since April 2005, couples who choose not to marry or, in the case of same-sex couples cannot marry, have been able to enter into a civil union.⁶⁷ This has enabled different-sex couples and same-sex couples to receive greater levels of recognition in a variety of legislation than has previously been the case.⁶⁸

However, although there has been an increase in the number of statutory entitlements, protections and responsibilities extended to these different forms of relationships, it is still not possible to say that greater equality has resulted. Ultimately, not all relationships are treated as equal – while same-sex couples may be able to enjoy various legal protections, and while same-sex couples may be able to enter into civil unions, they are still not able to achieve full and equal treatment before and under the law because of their exclusion from marriage.

Incrementalism as resistance

In order to protect the privileged status of marriage, those in decision-making positions in many jurisdictions across the world have actively sought ways of providing recognition to different forms of relationships – without providing access to marriage.⁶⁹ To date, the most usual response has been to provide legal recognition of same-sex relationships by way of registered partnerships. However, it is my contention that registered partnerships fail in that they offer to same-sex couples neither legal nor social equality with different-sex couples. What registered partnerships do offer is a legal compromise and the positioning of gays as second-class citizens.

In this sense, incrementalism has been used as a tool of resistance – a means of providing ‘a degree of equality’ to same-sex couples without denigrating the historic, traditional institution of marriage.⁷⁰

⁶⁷ Pursuant to the Civil Union Act 2004.

⁶⁸ Predominantly with the passing of the Relationships (Statutory References) Act 2005.

⁶⁹ See earlier discussion in relation to registered partnerships.

⁷⁰ On the Beehive Website in a section “Questions and Answers On Civil Union And Relationships (Statutory References) Bills”: “Do these Bills undermine marriage? No, the Civil Union Bill does not change the Marriage Act 1955. In fact, the institution of marriage remains solely available to a man and a woman. The terms “husband”, “wife” and “marriage” are not being removed from any legislation. Where any

ATTITUDE VERSUS KNOWLEDGE

There is a difference between “attitude” and “knowledge” – and, as a consequence, there is a difference between:

- decision-making based on attitudes – being defined as “opinion, way of thinking, view, posture”; and
- decision-making based on knowledge – being defined as “awareness, familiarity, understanding, what is known”.

To me, this is a vital element in the consideration of whether or not same-sex couples should be provided with access to marriage. I am of the view that human rights matters must be decided as a result of a informed consideration of all the relevant issues – that is, decisions must be the result of informed debate.

Human rights matters must not, conversely, be decided based on belief and attitude. This principle is reflected in the requirement of the New Zealand Bill of Rights Act that rights and freedoms can be subject “only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.⁷¹

Unfortunately, I would consider that, when it comes to matters of sexual orientation, there is much argument based in attitude rather than knowledge – turning to tradition and belief as a purported justification to discriminatory treatment. Much argument against same-sex marriage is couched in terms of both secular and religious tradition, but very few which are based in objective justifications.

Tradition

Introduction

A former Minister of Justice (who “personally” did not agree with the idea

legislation currently refers to “husband” and “wife” the terms have been retained” (Dated: 21 June 2004; Retrieved: 30 July 2009).

⁷¹ New Zealand Bill of Rights Act 1990 s.5.

of same-sex marriage) stated that:⁷²

... the law must change as society changes. If it loses its touch with the realities of society, the law can become outmoded, irrelevant or unjust. ... Diversity is a key defining characteristic of families in the nineteen-nineties.

The concept of tradition as a means of justifying existing practice is problematic on a number of grounds. On the one hand, if traditions are ‘set in stone’, at what point, and on what basis, did a particular practice become absolute and invariable? On the other hand, if traditions are not ‘set in stone’, on what basis are they able to change over time?

There are a number of historic practices that, although they may have been acceptable at a particular time in the past, are no longer acceptable because there is a different social context. For example, if there we were to adhere unswervingly to traditional practice, slavery would persist to the present day.

While I do not intend for this discussion to become overly tied up in semantics of the word “tradition”, I consider it relevant to consider two rather different dictionary meanings attributed to the word. The first meaning to which I refer is:⁷³

a system of principles, values and customs which a particular culture or society has built up over a period of time, and patterns of behaviour to which that society adheres.

The second meaning attributed to the word “tradition” is theological, and describes tradition as:⁷⁴

doctrine or a particular doctrine etc. claimed to have divine authority without documentary evidence, esp.: (a) the oral teaching of Christ and the Apostles, (b) the laws held by the Pharisees to have been delivered by God to Moses, (c) the words and deeds of Muhammad not in the Koran.

⁷² Graham, Hon Doug A. M., Minister of Justice, “The Minister Of Justice’s Opening Speech”, at a Symposium on Family Property, Victoria University of Wellington, in [1995] VUWLR 3: 3.

⁷³ “The Concise Oxford Dictionary of Current English”, 8th ed., Clarendon Press, Oxford (1991): 1293; “Collins English Dictionary”, HarperCollins Publishers (1995): 1631-1632.

⁷⁴ The Concise Oxford Dictionary of Current English, 8th ed., Clarendon Press, Oxford (1991): 1293; Collins English Dictionary, HarperCollins Publishers (1995): 1631-1632.

This distinction is particularly pertinent when considering the issue of same-sex marriage.

First and foremost, same-sex couples are seeking access to civil-legal marriage. While some couples might prefer to marry in a church or religious setting (religious marriage), the key consideration is equal access to civil-legal marriage (secular marriage).

There will be further discussion on the separation of the religious and the civil-legal aspects of marriage later in this section. However, I would ask the reader to keep in mind the notion that certain social and cultural practices become normalised gradually over period of time by a group of people living together in a social setting. On this basis, those social and cultural practices can be modified gradually over a period of time. Tradition, by definition, is not static, but is evolutionary.

In this section, I will examine the traditional meaning of marriage in New Zealand, the extent to which the definition of marriage has changed (and the extent to which it has not) and therefore the extent to which the definition of marriage is not absolute; and the distinction between marriage in the religious setting as compared with the secular, civil-legal setting.

The “traditional” definition of marriage in New Zealand

Lord Penzance in Hyde v Hyde & Woodmansee of 1866 stated that marriage:⁷⁵

as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

This definition was affirmed by the Court of Appeal in the New Zealand same-sex marriage case in 1997,⁷⁶ and remains the accepted and traditional definition of marriage in New Zealand.

⁷⁵ Hyde v Hyde & Woodmansee (1866) [1861-73] All ER 175: 177. It should be noted that the issue before the court in this case was that of bigamy – that is, the gender of the parties was not at issue.

⁷⁶ Quilter v Attorney-General [1998] 1 NZLR 523.

The Appellants in Quilter argued that it is not logical to justify discrimination by using “tradition” to support that discrimination – that this is nothing more than tautology. And yet this is precisely what is being done by our courts and by Parliament.

It was argued by the Appellants in Quilter that it is not justifiable to turn back to a common law definition of marriage stemming from the United Kingdom in 1866 to justify a definition of marriage in New Zealand in the 1990s. So, what happens? In the High Court case, the Crown takes us further back to the case of Lindo v Bellisario of 1795.⁷⁷ And, in the Court of Appeal judgment of Justice Tipping (one of the more favourable judgments) we are told that in the 1662 version of the Anglican Book of Common Prayer says that the first cause for which matrimony was ordained was “procreation”.

In the New Zealand context, therefore, the underlying message is that past discrimination is sufficient to justify contemporary discrimination. That is, the ‘tradition’ argument essentially states that any discriminatory practice is justifiable because it has been the practice for some time – no other explanation necessary.

It would seem that there is a failure to appreciate that while, in some instances, a respect for traditional values can be positive, in other instances an unfounded adherence to traditional values can be negative and destructive. Many exciting changes of the past would not have come about had we adhered to certain practices purely on the basis of former and contemporary practice: women would still be the chattels of their fathers or older brothers or husbands; marriage between different racial or ethnic groups would be denied; and women would not now have the right to vote.

Although marriage has been described by some as a patriarchal and oppressive institution,⁷⁸ it is important to acknowledge the evolution that marriage has undertaken in the New Zealand context. In this same

⁷⁷ Lindo v Bellisario (1795) 1 Hag Con 215: The issue before the Court in this case was the validity of Jewish marriage, and in the course of its considerations the Court discusses procreation – procreation is no longer seen as a requirement of the legal institution of marriage.

⁷⁸ For example, a Wellington anti-marriage lesbian group “Dykes Who Don’t Want A Bar Of It” expressed this view at the time of the Quilter same-sex marriage case.

context of evolution, it is also important to recognise that legal acceptance of same-sex marriage would bring a new dynamic to the institution.

The definition of marriage is not absolute

There are various ways in which the definition of marriage can be said to not be absolute. That is, there is no single definition of marriage that applies across all cultures or across all times.

If the definition of marriage cannot be considered as absolute, how might the definition be varied.

Traditions vary over time. It is highly unlikely that any particular tradition will remain unchanged for all eternity. The reality is that traditions associated with marriage, and the marriage relationship, have changed significantly over the years. If we had adhered to the “traditional” form of the relationships between men and women, we would still have, a range of practices and standards that, I suggest, we would now find unacceptable:

TABLE 1: CHANGES IN THE ‘TRADITIONAL’ MARRIAGE RELATIONSHIP	
Formerly	Currently
Unmarried girl / woman is the property of her father.	Mother and Father are the guardians of their daughter.
Married woman is the property of her husband.	Husband and wife are legal equals.
Women, being merely the property of their father / husbands, have no legal status and therefore cannot own property, or enter into contracts, in their own right.	Women, no longer being merely the property of their fathers / husbands, have full legal status and can own property, or enter into contracts, in their own right.
Women can be punished by their fathers / husbands as they are the property of their fathers / husbands.	A husband can be charged with a criminal offence if he rapes / assaults his wife.

A further example of how the definition of marriage has changed over time, is the current status of the ‘five elements of marriage’ from the

Hyde v Hyde definition of Lord Penzance. While all five elements may have been essential for the existence of a valid marriage in the United Kingdom in 1866, this is not the case in New Zealand in 2009:

TABLE 2: THE ELEMENTS OF MARRIAGE	
Element	Comment
The voluntary union	<p>There are two ways in which it could be argued that the voluntariness of participants to a legally valid marriage is not absolute:</p> <ul style="list-style-type: none"> – Marriages of convenience are, unless suspicion is aroused, legally valid marriages, although the consent is not given on the basis of a loving personal commitment of one partner to the other, but rather as the result of a 'business' arrangement. – Arranged marriages similarly are legally valid marriages although the consent is not given (directly) on the basis of a loving personal commitment of one partner to the other, but rather as the result of a cultural or religious imperative.
of <u>one</u> ... and <u>one</u> ...	Even in New Zealand, polygamous marriages are permitted – providing the marriages were valid in the country in which they were solemnised. ⁷⁹
to the exclusion of all others	Previously, adultery was a ground for divorce. However, no fault divorce was introduced in New Zealand in 1981, ⁸⁰ meaning that the failure to adhere admonition to 'exclude all others' did not result in the invalidation of the marriage.
for life	The advent of divorce many decades ago, ⁸¹ means that legal marriage does not have to, as a matter of definition, last until the death of one of the parties to that marriage. While some churches may still adhere to this element, this is a point of religious adherence rather than a legal requirement.
man and woman	In New Zealand we still adhere to this element.

⁷⁹ The Family Proceedings Act 1980 s.3 provides:

"Marriage" includes a union in the nature of marriage that –

(a) Is entered into outside New Zealand; and

(b) Is at any time polygamous, –

where the law of the country in which each of the parties is domiciled at the time of the union then permits polygamy.

⁸⁰ As a result of the Family Proceedings Act 1980 which came into effect on 1 October 1981.

⁸¹ The first New Zealand law permitting divorce was passed in 1867: State Library of Queensland, "Family History" No.3.6 (2007),

It can be noted, therefore, that only one of the five key elements of marriage as defined by Lord Penzance remains totally ‘untouched’. This is the element relating to – one **man** and one **woman** – while all others are tempered by exposure to other pressures.

It is inconsistent to rely on tradition to justify strict adherence to this one element of marriage while other elements have been subject to change. Tradition alone cannot be used, especially selectively, as a valid justification for continuing any practice or behaviour.

“Traditional” marriage “reductio ad absurdum”

Traditions also vary from culture to culture, and what may be seen as standard and acceptable practice according to the traditions of one culture, may not be so standard and acceptable within another. If we were to adhere blindly to a set of traditions associated with marriage, we may have ended up with a marriage celebration and ceremony that encompassed the following practices.

- The marriage would probably take place in about early June because most people took a bath some time in May and would still be smelling pretty good (England, 1500s). Prior to marrying, if the husband-to-be is a labourer or wage-earner, permission for the marriage would need to be obtained from the local Mayor or his representative (Bavaria and Austria, 1500s to 1921). Permission would be denied if the intending partners are of different races (Various; USA to 1967).
- Upon publicly announcing their intention to marry, the couple would have to cut their arms and drink one another’s blood (Ancient Persia). The prospective groom would need to inform the King of the couple’s intention to marry so that the King could have sexual intercourse with the bride-to-be before the groom (Ancient Mesopotamia). The marriage could not take place until the groom and the bride had had sexual intercourse, and it would be preferable for the bride to be pregnant at the time of the wedding (Ancient

Europe). Of course, the act of sexual intercourse would have to have taken place after the evening meal and after the sun had gone down – daylight hours are to be reserved for studies and prayer (Alexandria, 2nd-3rd century).

- A respectable dowry must be given by the parents of the bride (large amounts of cash and gifts such as televisions, cars and refrigerators). If this does not happen, the brides may be punished severely to the extent of being maimed or killed (India, modern).
- On the day of the wedding, the bride would travel from her home to the church, having sexual intercourse with every man she encountered on the way (Marche District of Medieval France). At the ceremony, the bride would be dressed in her finest gowns and the groom would be naked (Ancient Briton). During the wedding ceremony, the couple would be splashed with yak grease for good luck and fertility (Tibet), and an animal would be sacrificed and its organs examined for good and bad omens (Ancient Rome).
- Once the ceremony has concluded, the bride and groom would be expected to stand naked outside, and the husband would then have to kneel down and kiss the big toe of the left foot of his new wife to ensure fertility (France, 1500s). The husband would then be required to put on his wife's clothing and wear it for a month in order to gain an insight into her life (Masai Tribe of East Africa).
- For the duration of the marriage, the wife would not be permitted to own property – all property would be that of her husband (England, until about 1850). Instead, the wife would be the property of the husband, and if she were to behave in a manner disapproved of by him, he would be permitted to punish her – so long as he does not use a stick thicker than the width of his thumb (England into the 1900s). A husband would have a right to have sexual intercourse with his wife as and when he wishes – after all, she is his property (England, into the 1900s). If a woman is raped or sexually abused by a man other than her husband, the husband can take an action against that man for damage to property – the woman would have no legal standing to take a case in her own right (England, into 1900s).

- Any person who commits adultery will be sentenced to death (Justinian Code, AD500s), although the need for adultery by a male may be lessened because a man is permitted to have more than one wife (Christianity, Islam, early; Mormonism, 1820s to at least 1890s).
- Divorce may only be initiated by the husband (Various, until modern times), and once the divorce is final the ex-wife must become a “sworn virgin”, never again have sexual relations – under penalty of death – and dress, drink, smoke and act as a man for the rest of her life (Albania and Montenegro in Eastern Europe, Middle Ages). After the divorce, the ex-husband will be permitted to marry again only to a woman older than his ex-wife (Various Greek Societies, up to modern times). An alternative form of divorce is for the husband to sell his wife by tying a rope around her neck and presenting her for public sale to another man (England, 1690s – 1870s).

Religion

Secular tradition vis-à-vis religious tradition

In some countries, religious principles are central to the governance of that country. In theocratic countries the rule of law is closely linked to the interpretation of religious texts, and may involve politics which are directly dictated, or strongly influenced, by religious leaders.

In most Western democratic nations, however, there is a separation of the Church and State, whereby the government is a secular institution, there is no State religion, and there is no legislation that outlaws any particular religion or favours one religion over another.

The separation protects the State from interference by the Church in the secular affairs of the State, and protects the Church from interference by the State in the religious affairs of the Church.⁸² This separation is a

⁸² Although the State does have a role to play in the activities of the Church when those activities cross over into the secular realm. See: Catholic Charities of Sacramento Inc v Superior Court of Sacramento County (1 March 2004), Cal.4th, in which the California Supreme Court ruled that a Roman Catholic charity must offer birth-control coverage, even though the church considers contraception a sin. The Court relied on the fact that the Church offered such secular services as counselling,

fundamental element of our constitutional structure and, in practical terms, reinforces the argument for same-sex marriages – or at least constitutes an absence of an argument against.

New Zealand is not a theocratic state and is not strictly subject to the imposition of theological tradition upon it. On that basis, any concept of tradition based strictly on theological doctrine cannot be widely imposed on society generally. The style of Government we adhere to in New Zealand supports the notion that religious groups will not impose their beliefs and standards upon others.⁸³ And, the general population of New Zealand, while accepting of different religious beliefs and views, does not generally accept that their lives should be lived under the dictates of religious groups.

Conversely, particular religious denominations who so wish, may establish and maintain their own traditions within the overriding legal boundaries laid down by the state. For example, the State does not require the Catholic Church to recognise divorce within the Church's rules – the decision whether or not to recognise divorce rests with the Church.⁸⁴

The separation principle, allows for different rules between Church and State and, indeed, there are already instances where separate rules currently operate. The separation is evident, for example, in the differentiation between civil marriage and religious marriage. In France and some other European countries, there are two distinct marriage ceremonies – the civil-legal ceremony at the Town Hall, and the religious one at the Church. For the marriage to be legally recognised by the State, the first must occur – but the second is optional.

In New Zealand, the same separation does apply, in fact. However, when a couple chooses to marry with a religious ceremony, the religious and the civil ceremonies occur **at the same time**. A Minister of Religion who

low-income housing and immigration services to people of all faiths, the majority of whom are not Catholic, without directly preaching Catholic values.

⁸³ In fact, the New Zealand Bill of Rights Act 1990 protects us from that (see discussion below). The secular New Zealand education system is a good example of this.

⁸⁴ That is, the Church may refuse to marry, in a religious ceremony, a couple where either of the partners is divorced, on the basis that, in the eyes of the Church, the couple is still married.

solemnises a marriage should say the words “by the **powers** (plural) vested in me” (or similar) – meaning:

- the religious power vested by the Church to solemnise and bless the marriage; and
- the civil-legal power vested by the State, in accordance with the Marriage Act 1955, to act as a Celebrant to the marriage.

This separation of Church and State insofar as it applies specifically to marriage was outlined particularly concisely by Hon Dr Michael Cullen during the debate on the Civil Union Act 2004 in the House on 8 December 2004 when he said:⁸⁵

It is worth reminding ourselves that, in terms of our English law tradition, there was no secular law of marriage until 1754. Marriage was a purely ecclesiastic affair up to that point, and was regulated in part, one suspects, to try to force people to marry within the Church of England, because after 1754 one could marry outside the Church of England only if one was a Quaker. Nobody else could get married unless he or she got married within the Church of England, and that state remained until 1836, when Protestant dissenters achieved the passage of the Civil Marriages Act, and it became possible to marry outside the Church of England. That probably really created modern secular marriage as an institution.

Examples of the civil-legal (and non-religious) aspects of marriage

The practical manifestation of the separation of the religious and the civil-legal procedural requirements of celebrating or solemnising a marriage can be seen in New Zealand marriage laws. There are several instances where the legal procedural requirements are somewhat different from the practices followed by the Church.

Marriages on Sunday

Historically, as a matter of convention, churches have chosen not to perform marriage ceremonies on a Sunday. This convention arose from a combination of circumstantial factors rather than any formal prohibition.

⁸⁵ Hon Dr Michael Cullen, Deputy Prime Minister, Hansard: Parliamentary Debates, House of Representatives (8 December 2004).

Historically, as a matter of law, no Registrar was required to solemnise a marriage on days when the Registry Office was not ordinarily open to the public or on any day outside of the hours between 6:00am and 10:00pm.

This effectively meant that, in general, there were no marriages in New Zealand on a Sunday because Registry Offices were not open on weekends, and the Church would not marry couples on a Sunday. Registry weddings tended to happen during business hours during the week, and Church weddings tended to happen on Saturdays.

However, there is currently no formal legal prohibition against civil legal marriages taking place on a Sunday.

Couples who declare their intention not to have children

Traditionally, the Catholic Church requires that couples who are intending to marry declare their intention to have children. Couples who cannot have children, or do not wish to have children immediately may get married, but “an outright refusal to have children is a disqualification”.⁸⁶

This is supported by the belief that, based on the physical and mental difference between man and woman, the first purpose of marriage is for the bringing of children into the world:⁸⁷

A woman's body is made for the bearing and nursing of children; whereas, a man's body is stronger so that he can protect his family and give them food and shelter. A woman is kinder, more sympathetic, more emotional than man. She needs these qualities to care for and instruct her children.

Secular society, and our laws, make no such demand on couples who wish to marry. A couple who chooses not to have children may still have a perfectly legal and valid marriage in the eyes of civil society.

⁸⁶ “No Kids – No Marriage: Church”, news.com.au (2 June 2003), http://www.news.com.au/common/story_page/0,4057,6530878%255E13762,00.html (Retrieved: 17 March 2004).

⁸⁷ William J. Bradley, Roman Catholic Christian Teaching On Marriage, Catholic Mission, Ontario, Canada (2004).

Couples where one partner has previously divorced

Several Churches also decline to recognise divorce. In the Catholic Church, a couple may separate from each other, “in especial cases ... but the bond of marriage remains”.⁸⁸ A couple may dissolve their marriage in accordance with civil law, but will not have that dissolution recognised in the eyes of the Church and will not therefore be permitted to remarry in the Church.

A similar situation exists in other Churches. The Anglican Church / Episcopal Church of the USA holds to a similar doctrine. And in the case of Jewish law, a civil divorce is not recognised without a “gett” or religious divorce.⁸⁹

Other – civil-legal aspects of marriage

There is a range of other examples of marriage as a civil-legal institution:

TABLE 3: NEW ZEALAND MARRIAGE AS A SECULAR, CIVIL-LEGAL INSTITUTION	
In order for a marriage to be legally valid, the following must occur:	
Certain legal requirements must be met prior to a Licence being issued	<p>The parties to the marriage must meet the legal requirements before they can obtain a licence:</p> <ul style="list-style-type: none"> • Consent • Age • Prohibited degree of relationship
A Licence will be issued	The couple must obtain a Marriage Licence issued by the Department of Internal Affairs (that is, a document in legal form, issued by a Government Department).

⁸⁸ William J. Bradley, Roman Catholic Christian Teaching On Marriage, Catholic Mission, Ontario, Canada (2004).

⁸⁹ Hughes, R.W. (Director of Research), “Civil And Religious Divorce: Part 2”, Family Law Council, Office of the Attorney-General of Australia (3 August 1998).

A Celebrant must perform the ceremony	<p>A Marriage Celebrant (or, in specified circumstances, a Justice of the Peace) must officiate at the marriage.</p> <p>The Marriage Celebrant must be registered with the Registrar-General of Births Deaths and Marriages.</p> <p>In order to register as a Marriage Celebrant, a person must forward a certificate to the Registrar from the organisation, on whose behalf they intend to become a Celebrant, declaring that it wishes the member to be a marriage celebrant.</p> <p>The certificate must follow the folr prescribed in the Marriage Act 1955 s.9.</p> <p>That is, a Marriage Celebrant is a legal officer empowered by, and registered with, the State.</p>
Vows must be exchanged between the parties	<p>In accordance with the Marriage Act 1955 s.31: “During the solemnisation of every such marriage each party must say to the other (a) “I AB, take you CD, to be my legal wife or husband” or (b) words to similar effect”.</p> <p>That is, the form of the vows (“oath”) is set out by statute.</p>
The parties must sign the Marriage Register	The couple must sign a register (that is, a legal record belonging to the State).
The Witnesses must sign the Register	The witnesses must sign the register (that is, a legal requirement arising from statute).
A Marriage Certificate will be issued	After the marriage, the couple will receive a certificate from the Department of Internal Affairs on behalf of the register of Births Deaths and Marriages (that is, a Government Department and Official)
Note that there is no requirement for, and often with a registry marriage there is a conscious effort to exclude, any religious component in the ceremony	

Freedom of / from religious expression

There are a number of arguments that have been put forward against same-sex marriage that seem to distil down to traditional religious values being the fundamental barrier. For example:

- The “special rights” argument – The view that same-sex couples are seeking special rights to change the definition of an established social institution – marriage as the religious institution based on the union of a man and a woman.
- The “political pragmatism” argument – The idea that we can get civil unions now, but we cannot get marriage because society is not ready for it. Society still sees marriage as a religious institution based on the union of a man and a woman.
- The “procreation” argument – Marriage is first and foremost about bringing children into the world. The very tired argument: “That is why God made Adam and Eve, not ‘Adam and Steve’ ”.
- The “uncomfortable with it” argument – Attitudes towards persons who are gay or lesbian are still very much shaped by religious views about homosexuality.
- The “sanctity of marriage” argument – Marriage is seen as a holy estate, and if same-sex couples were permitted to marry, this holy estate might be “besmirched”.⁹⁰

If these arguments are to prevail, they will do so only on the basis that these religious concepts and values are given a prevalent status. It is my contention that by protecting the rights of freedom of thought, conscience and religion, the provisions of the New Zealand Bill of Rights Act 1990 also protect the right of freedom from religion.

There are situations in which we can apply human rights standards “unopposed”. For example, if a person has suffered an obvious detriment as a result of being treated less favourably than other people solely because of a clear physical disability, then discrimination has occurred. Not so obviously, however, are situations in which it is necessary to balance one set of rights against another.

⁹⁰ Law Commission Website Editorial “Many consider that to permit same-sex couples to marriage might besmirch the sanctity of marriage”.

In relation to the same-sex marriage issue, in addition to the notion of the secular state, it becomes necessary to balance the rights of freedom of religion, religious belief and expression and observance with or against the right to freedom from discrimination on the basis of sex (gender) and sexual orientation.

The New Zealand Bill of Rights Act 1990 contains the following provisions:

13. Freedom of thought, conscience, and religion –

Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and to hold opinions without interference.

15. Manifestation of religion and belief –

Every person has the right to manifest that person's religion or belief in worship, observance, practice, or teaching, either individually or in community with others, and either in public or in private.

19. Freedom from discrimination –

(vii) *Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.*

And, the New Zealand Human Rights Act 1993 contains the following provision:

21. Prohibited grounds of discrimination –

(viii) *IReligious belief:*

(ix) *Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions: ...*

These provisions protect the right of individuals to adhere to religious dictates which lead them to believe that homosexuality is a sin. At the same time, however, these same provisions protect the right of individuals to adhere to contrary beliefs based in their own religious dictates. That is, the freedom extends to religious thoughts and beliefs of

any kind including theistic, non-theistic and atheistic beliefs.⁹¹ It is also said that section 13 of the Bill of Rights Act is likely to include freedom from religion – meaning the Government cannot be seen to be taking sides in matters of religion or belief.⁹² This approach is consistent with the idea that the state cannot coerce or subject an individual to a particular form of preferred religious observance, and that it is not acceptable that one person's life is unduly interfered with by the religious beliefs and practices of another person.

Therefore, while one person may have the right to hold particular religious beliefs and to express and observe them in a particular way, at the same time any other person has the right to be free from those religious beliefs and the expression and observance of those beliefs.

On this basis, if a particular activity by one person is denied fundamentally because it conflicts with the held belief of another person, that denial is unacceptable under our existing human rights legislation. Consequentially, the power of the State does not extend to denying same-sex couples access to marriage if the fundamental reason for that denial hinges upon religious beliefs and practices (religious standards).

It is important to clarify that I am not suggesting that any element of the freedom of religious belief, expression or observance be limited in any way, shape or form. What I am suggesting, however, is that in a secular State the freedom of religious belief, expression or observance is not protected so that particular individuals are able to use it as a means of defining same-sex couples out of civil-legal marriage.

Conversely, the power of the State does not extend to being able to redefine the tenets of particular religions or the religious beliefs of the adherents to those religions.

This means that while the State must be free, on the basis of its secular legislation, to extend civil-legal marriage to same-sex couples, religious

⁹¹ Ministry of Justice, "The Guidelines On The New Zealand Bill Of Rights Act 1990: A Guide To The Rights And Freedoms In The Bill Of Rights Act For The Public Sector", Ministry of Justice (November 2004): <http://www.justice.govt.nz/pubs/reports/2004/bill-of-rights-guidelines/index.html> (Retrieved: 12 August 2009).

groups must also be free to decline to perform marriage ceremonies for same-sex couples where to do so would be in conflict with the dictates of their particular religion.

I would suggest that this balance between the right of same-sex couples to access the civil-legal institution of marriage and the right of religious groups to be free from performing same-sex marriage ceremonies is entirely consistent with the fundamental human rights principles of inclusion, acceptance, and celebration of diversity.

Summary – viewing marriage through the prism of change

It is important, therefore, to acknowledge that:

- we can view marriage through the prism of change and accept that just as change has occurred in the past, so then can further change occur into the future; and
- there is no need for the State to require the Church to recognise same-sex marriages and that, in the same way that the federal Government in Canada, the State can open up civil-legal marriage to same-sex couples and, at the same time, expressly provide that there is no legal requirement for any Church to perform marriage ceremonies for same-sex couples.

Knowledge

As I have mentioned previously, I see the legal system as not just being based around laws as they appear on the statute books and our interpretation of those laws in the courts. It is my view that perhaps the most important element of our legal system rests in the process of making our laws. That is, the process of reaching agreement that there is an issue that needs remedying, and the process of developing policy and encapsulating that policy in legislation. If legislation is well planned and developed it would seem logical that it will take account of a range of matters including, for example, human rights imperatives.

⁹² Rishworth, Paul, “Coming Conflicts Over Freedom Of Religion”, in Huscroft, G. and Rishworth, P., (Eds), Rights And Freedoms: The New Zealand Bill Of Rights Act 1990 And The Human Rights Act 1993, Brookers, Wellington (1995): 230.

In the main, the points that follow in this discussion relate very closely to the concept of recognising the dignity of the person.⁹³ I consider that hallmarks of treating affected persons with respect and dignity entails giving due consideration to all relevant matters, and making decisions on the basis of good information.

Members of Parliament and Decision-Making

It is frustrating to listen to a speech in a debate in Committee of the House and hear a Member of Parliament (MP), who is a qualified lawyer, misquoting the law, and then voting, at least in part, on the basis of the point made.⁹⁴

When Bills are being debated in the House, it is personally offensive to gays and lesbians to hear statements purported to reflect the 'lifestyle' of gays and lesbians, but which bear no resemblance to the reality of the lives that we, as gays and lesbians live every day.

It is frustrating also to consider that, when MPs proclaim these mis-statements they are, in effect, mis-educating other MPs who then, in turn, use this mis-information to inform their own decision-making process.

It is imperative that those persons who are charged with making or amending laws that will affect the day-to-day lives of New Zealanders vote for or against those laws on the basis of the best possible knowledge about the issues and the best possible understanding about the ramifications of the decisions they make.

It is my contention that many of our MPs forget this centrally important aspect of their role. Unfortunately for gays and lesbians, and for that matter any group within society, Parliament is not only the centre of the

⁹³ See discussion on 'dignity' that follows at the end of this chapter.

⁹⁴ Hansard (4 May 2000): "There is no doubt that under the Property Law Amendment Act 1986, de facto couples or **same-sex couples** can enter into property relationships" (Emphasis added). In fact, the Property Law Act 1952 s.40A (as inserted by the Property Law Amendment Act s.2) applies only to "Property agreements between persons cohabiting as husband and wife although not legally married to each other", and **does not** include same-sex couples (Emphasis added). (Note, however, that this provision has now been superseded by the provisions of the Property Relationships Act 1976).

legislative process – it is also a focal point of the political process. Listening to Parliamentary debates, and reading the Hansard of those debates, it is clear that many voting decisions are founded in a desire to chalk up political points rather than a desire to achieve the most proper result. In other words, the very nature of our political system leads politicians to seek the **best** result for the **most** people, rather than simply the **best** result – an outcome which is fundamentally contrary to the purpose of human rights laws, and fundamentally contrary to the reasons why we have our Human Rights Act 1993 and our New Zealand Bill of Rights Act 1990.

In order that MPs can make informed and appropriate decisions there is a need for them to be educated, not only generally on human rights laws as they apply in New Zealand, but also specifically on the substance and effect of proposed legislation, and its relationship with relevant existing legislation. It is important, in this process, for MPs to be provided with quality ‘free and frank’ advice from officials, and to take heed of that advice.

First and foremost, however, the onus for this education falls to the MPs themselves. It is essential that MPs familiarise themselves with the legislation that is being proposed and its interrelationship with any other legislation. This must include, where relevant, the interrelationship with human rights legislation, the role of human rights legislation generally, and the responsibilities of MPs in relation to that human rights legislation.

Second, the Human Rights Commission could have greater involvement in the education of MPs, especially now that the Bill of Rights standard of assessment of discrimination has been incorporated into aspects of the Human Rights Act 1993 and therefore squarely within the jurisdiction of the Human Rights Commission.⁹⁵ ⁹⁶ The Human Rights Commission is, by definition, an independent Government institution which, by law, has a primary function of advocating and promoting

⁹⁵ It may be recalled that the Human Rights Commission rejected a call for it to become an intervening party in the original High Court case on same-sex marriage in April 1996, on the basis that it did not have the jurisdiction under the Human Rights Act 1993.

⁹⁶ See discussion below under the heading “Constitutional Watchdogs”.

respect for, and an understanding and appreciation of, human rights in New Zealand society,⁹⁷ and in order to carry out that primary function is required “to be an advocate for human rights and to promote and protect, by education and publicity, respect for, and observance of, human rights”.⁹⁸

Third, it must fall to society at large to be well-educated about issues which affect it. It is no longer acceptable for society to shun its responsibilities towards minority groups. It is no longer acceptable for society to base its views on uninformed or ill-informed rhetoric.

Fourth, it falls to members of the affected groups, either individually or as groups, to challenge those MPs who fail to get it right. However, while it may become necessary to alert MPs to the fact that they are confusing their political role with their legislative role, care must be taken not to place the affected group in a position of carrying the primary burden. To shift the onus of the protection of minority groups onto those groups affected undermines the fundamental purpose of human rights legislation.

General Education and Promotion

It is my belief that education is perhaps the most significant weapon for success in any area where there is a required change in attitude. Communication is important in any situation where change is sought and especially so where there is a need to overturn prejudice. Prejudice is based in ignorance, and ignorance leads to fear – fear of the unknown. In this context ignorance and prejudice lead to homophobia.

It is my contention that we should be able to expect our human rights to be respected. But, the reality is that, in spite of our human rights laws, there is a great deal of misinformation about what those laws mean, and how they can be applied.

⁹⁷ Human Rights Act 1993 s.5(1)(a).

⁹⁸ Human Rights Act 1993 s.5(2)(a).

There is a range of areas where increased information about human rights legislation, its purposed and application, could enhance the usefulness of the legislation.

It has been the case that rather than seeing human rights compliance as something that can be aspired to, it has been seen as a threat. The human rights complaints procedure has been seen negatively by employees as a mechanism which provides employees with a means of holding the employer to task. It has been seen as a legislation which imposes compliance costs on employers, for example, in relation to the provision of enhanced access for persons with disabilities, and training in relation to sexual harassment in the workplace.

Perhaps one of the key areas for increasing the level of information about human rights standards and the application of human rights legislation is within our House of Representatives. It is disconcerting to hear MPs make speeches relating to Bills which have significant human rights content, seemingly unconcerned about the fact that what they are saying, or how they are intending to vote, may contribute to legislation that is contrary to our human rights laws.

It must be acknowledged that Parliament is supreme and, ultimately, can pass legislation contrary to the Human Rights Act and the Bill of Rights Act. However, such non-compliant legislation should only come into existence after a full consideration of the issues, and a justification in accordance with the Bill of Rights Act 1990 s.5. It should not be the result of a lack of understanding of the fundamental principles of human rights law and human rights legislation.

In a principle that is applicable to a wide range of human rights based issues, it has been stated that:⁹⁹

Ethnic communities around the country agree that racism and prejudice can only be countered with educational strategies that promote racial harmony and diversity for all.

It is often not knowing about an issue that breeds fear of that issue – the fear of the unknown. It has been shown that there is far less prejudice

⁹⁹ “Education is the Best Weapon in the Battle Against Racism”, in Ethnic Link, Office of Ethnic Affairs (December 2001): 3.

towards Māori New Zealanders from Pākehā New Zealanders who have some familiarity with Māori persons and Māori culture, than from those who do not.

In relation to gays and lesbians, a clear comparison can be drawn that there is far less prejudice against gay and lesbian people from non-gay and non-lesbian people who have gay and lesbian members of their own family, or who have other regular contact with gay and lesbian people. The mystery and the fear disappears along with the need to objectify the gay and lesbian person (“them”) and is replaced with an ability to relate as people.

As stated previously, the Human Rights Commission has a central role to play in human rights promotion and education. In the past, this role has been exercised somewhat sporadically.

For some time, the Commission has produced pamphlets on a range of human rights issues, has provided access to information by way of its website, has provided in-house training on specific human rights issues, and has facilitated education programmes within schools and with the public at large.

However, there have been some shortcomings with regard to this education process.

In fact, the notion of comprehensive human rights education programme is an ideal. The reality is that education on human rights issues has to compete for funding and resources in the same way that any other initiative must do.

Former Race Relations Conciliator, Rajan Prasad, has outlined two main reasons for human rights education receiving a more lowly status than might otherwise be the case:¹⁰⁰

- In the current environment where the emphasis is on economic development, the human element of the development equation has been left to the market to determine.

¹⁰⁰ Prasad, Rajan, “Human Rights Education In New Zealand Schools”, in [2003] Human Rights Education in Asian Schools 65: 66. Note, that in the current times of economic constraint, the points raised by Rajan Prasad are likely to be even further exacerbated.

- Schools are effectively run by locally elected Boards of Trustees, generally made up of parents of the children in the school. Their focus has tended to be on the essential curriculum – reading, writing, mathematics, science and the like.

These factors do not lead to the provision of intensive resources for an examination of, or education about, the relationship among citizens and between Government and citizen. The challenge therefore becomes how to best use the available resources to increase the level of knowledge about international and domestic human rights laws, and the rights of people under those laws.

Visibility

A key contributor to the greater likelihood of human rights compliant legislation is an increased visibility by those groups directly affected by human rights standards – or rather a lack of compliance with human rights standards.

This seems to be particularly so when personal stories are told of the detriment caused to individuals, families, groups of persons, by the existence of discriminatory legislation or Government policy and practice.

A lack of visibility means a lack of voice. A lack of voice means a lack of power to bring about change. Unfortunately, being visible is often linked with being vocal – the “squeaky wheel” syndrome.

The “real” issues for gays and lesbians tend to be somewhat invisible. Gay and lesbian communities tend to be visible to the wider population through the HERO festival in Auckland, or the Sydney Mardi Gras. Often, even when the television media is presenting an item on the recognition of same-sex relationships, or on same-sex families, it will revert to file footage of a dance party.

Surprisingly to some perhaps, the greater number of gays and lesbians live private lives which do not feature on television or in the newspapers. Often these private lives are impacted by a life crisis which results in gross injustice – the man who is prohibited, by the family of the

deceased, from attending the funeral of his life-partner of 12 years; the woman who is denied a legal parental relationship with the children of her partner during their relationship, but is then required to pay child-support when the relationship comes to an end; and many, many more.

While human rights should not rely on societal acceptance of a minority group (a topic to be developed further in this chapter), there is no doubt that visibility of those affected, and the way in which they are affected on a personal level, can be a hugely significant tool in bringing about change.

I do not believe that being reactive as gays and lesbians is the most productive means of educating others within society. For example, if we face up on the news or in current affairs programmes / reports to counter the arguments put forward by others, we will be viewed as the whingers and the aggrieved.

It is far more productive, I believe, for us to be proactive. And, there is a range of ways in which we can do this.

First, we can initiate the dissemination of information in a range of ways. We might do this formally, by leading workshops and seminars. We might send out press releases from organisations to which we belong. We might gather statistics which help paint a picture of our communities.

However, one of the best ways we can educate is to be visible. And again, there is more than one way in which we can be 'positively' visible.

For many of us, visibility might mean no more than going about our daily lives. By doing this, we are displaying to our families, friends, colleagues, and others, that we are functioning members of society. Amazingly, we meet the same obligations in our family, home, work and social environments as any other person. We experience the same difficulties and happinesses in our family, home, work and social environments. Our mere presence and visibility can serve to assist others overcome their fears and prejudices towards gays and lesbians.

Visibility can also mean ensuring that our stories are told. One of the most powerful change tools can be the story about how a particular piece of legislation has been unjust and has caused distress or severe

hardship to someone for no reason other than the fact that their sexuality excludes them from the protection of the law.

Each of these means of increasing visibility, whether it be in a formal setting or informally, is also a means of increasing the level of knowledge of others about the real issues. And increasing the level of knowledge reduces the opportunity for misinformation and misconception.

Summary

Decisions on human rights matters are, by definition, decisions which affect peoples' everyday lives.

The process of decision-making is one which requires us to draw on our knowledge of a particular situation and to weigh up the possibilities and come to a conclusion about the preferable course of action. Our decisions, therefore, are made on the basis of our knowledge in relation to the issue at hand.

If we are required to make a decision in relation to a particular issue about which we have a knowledge gap, we respond in one of three ways:¹⁰¹

- 1) We fill the knowledge gap with opinion and belief – and make a decision based on that opinion and belief.
- 2) We can fill that gap with inaccurate information – and make a decision based on that inaccurate information; or
- 3) We can fill that gap with accurate knowledge – and make a decision based on that accurate knowledge.

Logically, only the third of these is acceptable. When we are making decisions which affect peoples' lives, we must make those decisions on the basis of the best knowledge available to us. If our knowledge is flawed, then it follows that our decision will be flawed.

¹⁰¹ Note that there will be various permutations of these, but I have simplified them for the purposes of this argument. Note also that a fourth possible option could arguably be that we leave the knowledge gap, and make a decision in a knowledge-vacuum. I do not believe that this is a “real” option, however, as I consider that we always tend to fill the vacuum, whether consciously or subconsciously.

It is interesting to note that, in relation to another area of human rights, the Human Rights Commission undertook a study which suggested that much of our attitude in these areas are developed in a knowledge vacuum. A survey of human rights and the Treaty of Waitangi showed that, while most New Zealanders have reasonably strong views about Treaty issues, very few have a clear understanding of the Treaty and what it represents.¹⁰²

I would suggest that the same is true of human rights and discrimination issues. While many New Zealanders hold quite strong views about issues relating to sexual orientation, very few have a clear understanding of human rights issues generally, and discrimination on the ground of sexual orientation (as well as gender / sex and other related grounds) in particular.

What is concerning is that this lack of a good, basic understanding in this area extends to our Parliamentarians who should be applying principles of human rights and anti-discrimination law in their legislative role. On this point, I return to the notion of a “free vote”, and to the notion that MPs make decisions on the basis of their comfort level, or on the basis of their own moral judgement. In this, they ignore the meaning and the role of our human rights laws and standards.

We must, in the human rights area above all others, be able to extend above decisions based in opinion, belief, levels of comfort, and moral judgement. We must reach the point where such decisions are made on knowledge and understanding rather than attitude and belief.

Rajan Prasad lists a number of points which he sees as lessons learned that might enhance the teaching of human rights. These include (but are not limited to):¹⁰³

- Human rights education programmes will come to nothing unless they come from a strong belief in human rights and are seen as being worthy of support.

¹⁰² Human Rights Commission, “Treaty of Waitangi and Related Issues: Omnibus Results”, Human Rights Commission (February 2006).

¹⁰³ Prasad, Rajan, “Human Rights Education In New Zealand Schools”, in [2003] Human Rights Education in Asian Schools 65: 69-70.

- Human rights education programmes should not be seen as optional. No element of public policy that has an optional aspect to it has a good record of positive change – especially when some are cynical about its importance, and yet others take it on board grudgingly.
- Human rights education must promote the enhancement of human rights as a social benefit, rather than the emphasis being on “excessive” compliance costs of human rights protections.
- Human rights must be led by powerful national leaders. If leaders are seen as being ignorant of, or being aware of but actively ignoring, human rights principles and standards, education programmes will not be successful.
- Human rights education must be approached holistically. Good work done in education programmes will be undone if others in the community do not know about and adhere to human rights principles and standards.
- Human rights education must be delivered by people for whom human rights principles and standards are an accepted part of everyday life – leading by example.

Courage and commitment are the key – ability to stand up for what is right as opposed to what is popular.

DIGNITY

It is my view that the points discussed in this chapter are all important considerations in relation to this thesis, the consideration of the issue of same-sex marriage, and in relation to human rights issues generally. As will be seen in further discussions in this thesis, I consider that inherent in human rights laws and principles is the notion of respect for the person. Often, this is about the respect for the individual and, particularly, respect for the individual who is a member of a minority group seeking an equal voice. It is about respecting that voice, and striving to understand what is being said in a meaningful and responsive manner.

In that sense, this thesis is about dignity of the individual – insofar as it relates to the status of gays and lesbians as individuals within society; it is about the dignity of relationships – in so far as it relates to the manner in which gay and lesbian relationships are recognised, and therefore validated, by and within society; and it is about the dignity of our communities and our society generally – in so far as it reflects the extent to which we are all able to relate as equals to one another regardless of sexual orientation.

The concept of ‘dignity’ has been a core component of modern international human rights laws documents from their development from the mid-1900s. For example, ‘dignity’ is a central concept in the United Nations Charter:¹⁰⁴

We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ...

And, the Universal Declaration of Human Rights:¹⁰⁵

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.

And, the International Covenant on Civil and Political Rights provides that:¹⁰⁶

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ...

At the same time, however, the concept of ‘dignity’ has not attracted a great deal of attention in the domestic human rights setting. With a gradual growth of awareness and acceptance of international human rights standards either directly by incorporation into domestic law, or

¹⁰⁴ Preamble to the Charter of the United Nations (signed 26 June 1945, and came into force on 24 October 1945).

¹⁰⁵ Preamble to the United Nations Declaration on Human Rights (adopted by the General Assembly of the United Nations on 10 December 1948).

¹⁰⁶ Preamble to the International Covenant on Civil and Political Rights (adopted and opened for signature, ratification and accession by General Assembly

indirectly by way of a greater understanding of their relevance in domestic human rights discourse.

This has been attributable, in part, perhaps to the fact that it has been difficult to arrive at a specific definition of dignity. Historically, the notion of dignity has been the subject of philosophical and religious discussion and one of the difficulties has been arriving at a commonly agreed meaning appropriate in a human rights law context.

This, of course, can have its advantages. Keeping a term such as ‘dignity’ at a somewhat notional or conceptual level can allow a flexibility that is lost when a term becomes narrowly defined – particularly when the general principle that human rights provisions should receive a broad and liberal interpretation is applied.

Development in the meaning of ‘dignity’

In reaching a modern understanding of the meaning of dignity, the term has been viewed in several different ways. For example:¹⁰⁷

- In classical Roman times, the term ‘*dignitas hominis*’ basically signified honour and respect deriving from ‘status’. That is, any sense of dignity was attached to the office of the person rather than the person themselves. This gave rise to dignity in the sense of status, reputation and privilege.
- Over time, the term dignity came to mean the dignity of human beings as human beings, not reliant on status.¹⁰⁸ At the same time, rather than dignity arising from status of birth or station in life, ‘dignified’ man was symbolised by the distance that man was able to place between the baser instincts of animals, and the elevated level of thought and reflection of himself.

Resolution 2200A (XXI) of 16 December 1966; entry into force 23 March 1976).

¹⁰⁷ McCrudden, Christopher, “Human Dignity And Judicial Interpretation of Human Rights”, Working Paper No.24/2008, University of Oxford, Faculty of Law, Legal Studies Research Paper Series (July 2008): 2-10.

¹⁰⁸ McCrudden, Christopher, “Human Dignity And Judicial Interpretation of Human Rights”, Working Paper No.24/2008, University of Oxford, Faculty of Law, Legal Studies Research Paper Series (July 2008): 3.

- In a somewhat similar vein, the ‘dignity’ of man has also been contingent upon the relationship between God and man, with man possessing “the dignity of a person who is not just something, but someone”.¹⁰⁹
- And, perhaps closest to the current, modern concept of dignity, dignity by reference to man as an autonomous being, dignity being inherent and not predicated on status, or specified relationships with God or creature.

Perhaps the clearest indicators of the inherent dignity of the person are those that relate to others’ respect for the person – in life or in death – and others’ respect for the presumed ability of that person to be able to make certain decisions for him or her self, and to participate fully in the society in which they live.

Dignity encompasses such characteristics as the ability to act rationally and reflectively which is seen as an ‘unconditioned and incomparable worth’ that is beyond price,¹¹⁰ and the parallel view that “persons should not be treated merely as a means but, rather, as ends in themselves”,¹¹¹ coupled with the social context as demonstrated by the extent to which an individual feels valued within his or her own community.¹¹²

In this sense, human dignity is about the subjective (the feelings of the individual) and the objective (within a broader context):¹¹³

Human dignity ... does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?

¹⁰⁹ McCrudden, Christopher, “Human Dignity And Judicial Interpretation of Human Rights”, Working Paper No.24/2008, University of Oxford, Faculty of Law, Legal Studies Research Paper Series (July 2008): 3.

¹¹⁰ O’Connell, Rory, “The Role Of Dignity In Equality Law: Lessons From Canada And South Africa”, in [2008] 6 I-CON 267: 269; quoting Immanuel Kant, The Moral Law: Groundwork Of The Metaphysics Of Morals, 434-440 (Hutchinson 1948) (1785): 436.

¹¹¹ O’Connell, Rory, “The Role Of Dignity In Equality Law: Lessons From Canada And South Africa”, in [2008] 6 I-CON 267: 269; quoting Immanuel Kant, The Moral Law: Groundwork Of The Metaphysics Of Morals, 434-440 (Hutchinson 1948) (1785): 434.

¹¹² O’Connell, Rory, “The Role Of Dignity In Equality Law: Lessons From Canada And South Africa”, in [2008] 6 I-CON 267: 269; citing John Rawls, A Theory Of Justice, 62, 178, 440, Oxford University Press (1972).

Drafting of international human rights treaties

McCrudden's provides an analysis of the significance of 'human dignity' in the drafting of the international human rights documents, bearing in mind the international context in which this drafting has taken place:¹¹⁴

To achieve a successful outcome, it was necessary to persuade states of vastly different ideological hue that the Declaration was consistent with their conceptions of human rights. What would a theory of human rights have to consist of for it to be a successful theory in this context? It would need, probably, to be one:

- (x) that gives a coherence to the concept of human rights so that the whole is greater than simply the sum of its parts and not just a ragbag collection of separate unconnected rights,*
- (xi) that is not rooted in any particular region of the globe and appeals across cultures, but is sensitive to difference,*
- (xii) that places importance on the person rather than the attributes of any particular person, but also places the individual within a social dimension,*
- (xiii) that is not dependent on human rights originating only from the exercise of state authority (not least because what the state gives, the state can also take away),*
- (xiv) that is non-ideological (in the sense that it transcends any particular conflicts, such as between capitalism and communism),*
- (xv) that is humanistic (in the sense that it was not based on any particular set of religious principles or beliefs but is consistent with them), and*
- (xvi) that is both timeless, in the sense that it embodies basic values that are not subject to change, and adaptable to changing ideas of what being human involves.*

Such a theory has long been the Holy Grail of human rights.

¹¹³ *Law v Canada (Minister of Immigration)* [1999] I.S.R.C. 497: Iacobucci J: Para.53.

¹¹⁴ McCrudden, Christopher, "Human Dignity And Judicial Interpretation of Human Rights", Working Paper No.24/2008, University of Oxford, Faculty of Law, Legal Studies Research Paper Series (July 2008): 26-27.

Disadvantages

There are some potential problems arising from the concept of dignity in human rights considerations. These difficulties relate to the fact that the concept is:

- open to significant judicial manipulation; and
- increases, rather than decreases, judicial discretion.

McCrudden states:¹¹⁵

[W]here human beings are regarded as having a certain worth by virtue of being human, the concept of human dignity raises important questions such as “What kind of beings are we? How do we appropriately express the kind of beings we are?”. Radically different answers are possible, of course, and therein lies the root of the problem with the concept of human dignity.

In a similar vein, O’Connell states:¹¹⁶

Judges decide issues of equality based on specific articulations of ideas regarding stereotyping, personal characteristics, and the like. “Dignity”, on the other hand, is an abstraction, and there is a great deal of leeway for unarticulated value assumptions to enter into judicial decision making. What one person regards as an intolerable assault on human dignity, another may see as incidental, as part of everyday life. What one person may see as a racist denial of dignity, another may see as a legitimate affirmative action. ... Any human rights jurisprudence will require judges to make significant moral choices. The competing interpretations of dignity, in particular, allow for unarticulated value judgments to determine their decisions.

¹¹⁵ McCrudden, Christopher, “Human Dignity And Judicial Interpretation of Human Rights”, Working Paper No.24/2008, University of Oxford, Faculty of Law, Legal Studies Research Paper Series (July 2008): 3.

¹¹⁶ O’Connell, Rory, “The Role Of Dignity In Equality Law: Lessons From Canada And South Africa”, in [2008] 6 I-CON 267: 279-280.

Advantages

On the other hand, there are some significant advantages in that the concept of dignity:¹¹⁷

- provides a standard for interpretation; but
- can vary from jurisdiction to jurisdiction (allowing for regional / local variation); and
- can vary over time.

While it is difficult to attribute a specific meaning to the term ‘dignity’, including a consideration of dignity in the equation in human rights cases serves to ensure a consideration of the purposes of the relevant legislative provision(s), and to ensure a consideration of the more intangible impact upon the individual.

Dignity as a contextual framework

Bearing in mind the difficulty in defining the term ‘dignity’, I have consciously kept my discussion of dignity at a conceptual level. At the same time, I return to this concept at various times and in various ways throughout the thesis.

On some occasions these references are explicit. This is the case, for example:

- in this chapter, both in this section (obviously) and in all subsequent sections;
- in the other chapters setting the context in which this thesis has been written and should be read (Chapters 4 and 5);
- the discussion relating to the same-sex marriage cases – particularly Halpern (Canada) and Fourie (South Africa) ¹¹⁸ (Chapter 9).

¹¹⁷ McCrudden, Christopher, “Human Dignity And Judicial Interpretation of Human Rights”, Working Paper No.24/2008, University of Oxford, Faculty of Law, Legal Studies Research Paper Series (July 2008): 4.

¹¹⁸ I note that there has been a progressive increase (general trend) in reliance on the dignity argument in key court cases. The number of mentions of the term ‘dignity’

On the other hand, however, I consider that some of the other discussions also rely on the dignity argument, although in these instances the inclusion of 'dignity' is more implicit. For example:

- It is my view that there is a difference between acknowledgement and recognition of same-sex relationships. Inclusion of same-sex relationships within the Property (Relationships) Act 1976 provide for the recognition of the rights of one partner vis-à-vis the other at the time a relationship comes to an end and thereby acknowledges the existence of the relationship, but that legislation is not about recognising the core relationship itself.
- I talk of human rights as a journey, rather than a destination. By this I mean that, for me equality means equality. While acknowledging that the concept of equality is not simple to define, I still have some difficulty with the notion that equality can be progressively realised. In my view, it is not possible to be partly equal, or to be more equal today than was the case yesterday. Such a suggestion flies in the face of the invocation inherent in the provisions in the International Covenant on Civil and Political Rights that civil and political rights are immediately enforceable.¹¹⁹
- I also discuss the issue of seeking public opinion on minority issues. Human rights fundamentally is about protecting an affected minority against majoritarian prejudice. Where is the principled support, therefore, for the notion of seeking majority view on how the minority group should be treated by the law?
- I also consider that there is something offensive to dignity in the having to argue for access to rights. Logic would say that, where a

while not a conclusive indicator of a substantive consideration of 'dignity' does lend some credence to the view that there has been an increase consideration of and reliance upon this concept. Mentions rate as follows: British Columbia (EGALE) – 2001 – dignity receives 4 mentions; British Columbia (Barbeau) – 2003 – dignity receives 3 mentions; Massachusetts (Goodridge) – 2003 – dignity receives 6 mentions; Ontario (Halpern) – 2003 – dignity receives 32 mentions; South Africa (Fourie) – 2005 – dignity receives 48 mentions.

¹¹⁹ International Covenant on Civil and Political Rights, Article 2(2): "... each State Party ... undertakes to take the necessary steps ... to adopt such laws or other measures as may be necessary **to give effect to the rights** recognized in the present Covenant" [Emphasis added]. Compare this with the equivalent provision in the International Covenant on Economic, Social and Cultural Rights Article 2.1: "Each State Party ... undertakes to take steps ... to the maximum of its available resources, **with a view to achieving progressively** the full realization of the rights recognized

Parliament has put in place legislation that prohibits discriminatory treatment by the State (as is the case in New Zealand), the onus falls to the State to ensure that anti-discrimination rules are not breached by them, rather than requiring the affected individual to argue discrimination and prove the breach. This in itself is an issue of dignity.

The following table summarises points raised in this thesis that draw on the dignity argument (this list includes and extends those matters outlined briefly above). The column entitled “Enhancing Dignity” contains key elements and characteristics that support the concept of dignity in contrast with key elements and characteristics that derogate from the concept of dignity.

TABLE 4: DIGNITY OF THE PERSON		
Enhancing Dignity		Demeaning Dignity
recognition	–	acknowledgement
acceptance	–	tolerance
full participation in society	–	limited participation in society
self-actualisation / autonomy	–	decriminalisation
self-actualisation / autonomy	–	anti-discrimination
destination	–	journey
status	–	process
immediate enforcement	–	progressive realisation
immediate enforcement	–	incrementalism
policy	–	politics
presumption of inclusion	–	presumption of exclusion
conciliation / peace / contentment	–	anger
esteem / honour	–	stigmatisation
non-discrimination	–	discrimination
minority protection	–	majoritarian prejudice
onus on Government to ensure access to rights	–	onus on minority to seek access to rights

in the present Covenant by all appropriate means, including particularly the adoption of legislative measures” (Emphasis added).

Chapter 4

HUMAN RIGHTS AND CITIZENSHIP

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INTRODUCTION

The extent to which an individual is able to function and participate fully within the society in which they live is determined largely by the extent to which that society allows that individual to participate. The extent to which a society delimits the participation of an individual also serves to delimit that individual's citizenship. The exclusion of gays and lesbians, and same-sex couples, from certain societal activities and institutions, restricts their ability to participate fully and equally in the society in which, supposedly, they belong.

The exclusion of some individuals from full participation in society acts to the detriment of those persons in terms of access to products, services and entitlements that can be accessed by others, and in terms of their personal and social status. The exclusion of some individuals from full participation in society because of certain personal characteristics that provide no logical or rational basis for that exclusion would seem to be discriminatory. Cumulatively, exclusion from full participation in society and the concomitant denial of access to entitlements and discrimination are demeaning of individual and group dignity.

This chapter investigates issues of equal treatment and different treatment, rights and duties, democracy and citizenship, and the premise that these concepts are all inter-related and inter-dependent. It is my contention that the extent to which democracy is well-functioning, that full participation in society is enable, and dignity is preserved all flow from the extent that minority groups are extended equal rights and an equal place in the society within which they exist.

Background

In most western democracies, homosexuality is looked upon with somewhat less fear and disdain than it was, say, a hundred years ago. Historically, in most western democracies homosexual activity has, at

some point, been criminalised and then, at some later point, been decriminalised.¹ Physical sexual activity between consenting adults of the same gender is not now a criminal act in New Zealand, meaning that acting upon one's homosexual desires is not now frowned upon by the law, so long as those activities are not taken outside the bounds of public decency – the same parameters as for different-sex couples.²

The rights of gays and lesbians to interact socially amongst themselves within a wider social context are acknowledged and protected. It is generally acceptable, for example, for gays and lesbians to congregate in their own social venues without interference from society at large.

The rights of individual gays and lesbians in their interactions with other members of wider society are legally protected (even if the application of various protections can be somewhat unpredictable in practice). These protections are demonstrated through the prohibitions against discrimination in relation to, for example, housing, employment and sexual harassment.³

An awareness has grown also of the presence of gays and lesbians as couples within society. Initially, same-sex couples were acknowledged by legislation and legislative provisions but there has been a gradual move from awareness and acknowledgement towards recognition and acceptance.⁴ In essence, the fundamental needs of gays and lesbians as individuals, and as collectives of individuals, have been met.

However, there has been a hesitancy with regard to extending, to same-sex couples, the same form of relationship recognition that is extended to different-sex couples. In a twist of irony, there has been a legal and, in the main, social acceptance of same-sex relationships at the physical,

¹ For example, in most Westminster-based systems, homosexuality has been re-decriminalised, having only been criminalised in 1533 under the laws of Henry VIII.

² In New Zealand this came about as a result of the Homosexual Law Reform Act 1986, which decriminalised homosexual behaviour between men (lesbian sexual behaviour had never been criminalised) with an age of consent of 16 years, equivalent to that for heterosexual sexual behaviour.

³ Human Rights Act 1993 s.21: Prohibited Grounds of Discrimination.

⁴ For example, in New Zealand, same-sex couples are included in the Domestic Violence Act 1995, but this is more about the rights of protection of a victim of domestic violence than it is about the recognition of a same-sex relationship. In more recent times same-sex relationships have been recognised through the Civil Union Act 2004. This issue of acknowledgement as compared with recognition will be discussed in more detail in Chapter 6.

sexual level,⁵ but a continued reticence to fully recognise and respect the love and commitment that is expressed by core relationship between two individuals in the same way that the relationships of different-sex couples are recognised. It may be that this stems from the desire of some members of society to maintain the perception that same-sex relationships occur only at the physical, sexual level. In that way, it remains easier to despise these relationships because they cannot possibly be equated with those relationships and families that fit the heterosexist norm. Furthermore, if same-sex relationships cannot be equated with the exclusively heterosexual social institutions that are worthy of recognition through marriage, they do not become a threat to the status of those relationships.⁶

As gay and lesbian couples, the challenge for us has been, therefore, to find a pathway through the social and legal barriers which currently prohibit the full and equal recognition and acceptance of our intimate and personal relationships one to another.

It is a fundamental premise of this thesis that the exclusion of same-sex couples from marriage, as a foundational institution in our social structure, constitutes discrimination against same-sex couples. This premise will be referenced many times over throughout the thesis. In this chapter, therefore, I examine a range of issues in order to establish, in philosophical and principled terms, what discrimination means for a minority group such as gays and lesbians. In order to achieve this, I consider the nature of the right to be free from discrimination, and the implications of the complex and intricate interactions between this right and:

- citizenship – in the sense of being a member of the citizenry of the country;

⁵ The Homosexual Law Reform Act 1986, decriminalised same-sex sexual activity with an age of consent of 16 years – the same as for different-sex sexual activity.

⁶ This point was commented on during the debate on the Civil Union Bill. Brian Donnelly (NZ First) said, for example: “The message, therefore, must be that gays can have legal sexual relationship, but that there is no legal way they can make public commitment to long-term, exclusive relationships. That, I put to this Committee, is a position that encourages promiscuity, and that position is in no one’s best interest in terms of public health”: Hansard Advances (7 December 2004), <http://www.clerk.parliament.govt.nz/Hansard/Hansard.aspx> (Retrieved: 9 December 2004).

- being – the aspirational needs of persons to reach their full potential as individuals and in their relationships with others;
- democracy – not in its bare form as outright majoritarian rule, but more in terms of effective checks against such majoritarian rule and the ability of a society to protect its minority groups;
- rights (and obligations) – and the ability to access those rights (and exercise those obligations); and
- dignity – as a conceptual symbol of citizenship, equality and being.

THE NATURE OF CITIZENSHIP

Viewing citizenship as a presence within, and an ability to participate within, a country's social community, the extent to which an individual is free to participate fully in that social community is limited also to the extent to which their citizenship is limited.

A person, as a 'subject' (rather than a citizen), is separate from, and is expected to be obedient to, their ruling authority. The relationship is bi-lateral with the subject owing his or her subservient and unquestioning allegiance to the ruling authority. Whereas being a subject is defined in terms of being subjected to the rule of an authority that is all-powerful, citizenship is defined, quite differently, as:⁷

... a legal status defining the relationship between an individual and the state, defining both rights and duties each bears to the other.

Citizens carry the right to a political vote and therefore the ability to elect to a representative body, from amongst themselves, persons who they believe will best represent their interests. In this sense, the citizenry is part of the governing body and, in turn, the governing body is the collectivity of the people, as so famously described by President Abraham Lincoln in his 'Gettysburg Address':⁸

... government of the people, by the people, for the people ...

⁷ Robertson, David, A Dictionary Of Human Rights, Europa Publications Ltd, London (1997): 39.

⁸ President Abraham Lincoln, "Gettysburg Address", Gettysburg, Pennsylvania, USA (19 November 1863).

The transition to our modern Westminster-style democracy from a strict monarchy was also a transition from a relationship between those who rule and those who are ruled (subjects), to a relationship between those who govern and those who are governed (citizens).

The relationship of the citizen and the State is a complex reciprocal relationship between the citizen and the citizen, and between the citizen and Government. This implies that citizens, by virtue of a right to participate fully in the governance of their country, also carry duties and responsibilities towards the society in which they live. It also implies that there are certain rights that will be extended to persons who are viewed as citizens, but not to persons who are not viewed as citizens.⁹ It also implies that, maybe, certain rights which generally flow from citizenship should be denied those persons who have acted in some way in breach of the obligations of their citizenship, but should not be denied those persons who have not acted in breach of the obligations of their citizenship.¹⁰ However, limitations on a person's rights also serve to limit the extent to which that person is able to participate fully in society and, in turn, to limit the extent of their citizenship.¹¹

CITIZENSHIP AND "BEING"

A well-known educationalist in the 1950s, Abraham Maslow, became famous for his theory of a hierarchy of individual social needs.¹² The fundamental premise of his theory was that the driving force for human motivation is the desire for self-actualisation. Maslow identified self-actualisation as the highest drive, but believed that before a person could self-actualise, certain other lower motivations, such as hunger, safety and belonging must be satisfied.

⁹ For example (a) formerly, women were not seen as citizens in their own right, and therefore were not conferred with the right to vote, (b) currently, overseas persons who are visitors to New Zealand are not extended the right to vote.

¹⁰ For example, under the Electoral Act 1993 s.80(1)(d), persons sentenced to a prison term of 3 years or more are disqualified from voting while in prison. Interestingly (pertinent to this thesis), persons in prison who are convicted of a serious crime are permitted to marry.

¹¹ For example, if a person is denied the right to vote, the extent of their participation in society is limited.

¹² Maslow, Abraham, Motivation and Personality (1954).

I have employed this same general principle analogising it to the desire by gays and lesbians to achieve personal fulfilment in their own lives and within their societies – to achieve a full sense of ‘being’ within the wider social framework. To me, reaching a state of full acceptance as gays and lesbians within our wider society can be likened to Maslow’s attainment of self-actualisation. This process, whether as individuals, or collectives, or groups, suggests a growth and transition from a non-status (criminalised, non-lawful, non persona) to a state of ‘being’ (full, unequivocal acceptance). I illustrate this as follows:¹³

TABLE 5: ANALOGISING MASLOW’S ‘HIERARCHY OF NEEDS’			
Level	Maslow	Gay and Lesbian	Status
5	Self-Actualisation	Acceptance	Being
4	Esteem Needs	Equal Treatment	Needing
3	Belonging Needs	Relationship Recognition	
2	Safety Needs	Non-Discrimination	
1	Physiological Needs	Decriminalisation	

Attainment of self-actualisation can be aligned with the attainment of full acceptance of gays and lesbians by others (in a sense, the absolute absence of societal homophobia) and, perhaps even more importantly, the acceptance by gays and lesbians of themselves (the absence of internalised homophobia). In this climate, gays and lesbians are able to function within society, as individuals or couples, on exactly the same basis as their heterosexual counterparts – that is, gays and lesbians can equally and fully exercise their citizenship.

¹³ The application of this analogy is illustrated, for example, through the discussion in Chapter 6, with regard to decriminalisation in New Zealand, and in subsequent chapter with regard to the advent of access to marriage by same-sex in overseas jurisdictions.

Level 1 – Decriminalisation

In order for the higher-level goals to be attained, the lower-level needs must first be met. The initial need for gays and lesbians is to be free of criminality. In practical terms, so long as homosexual behaviour remains criminal behaviour, it is very difficult, on a personal level, for many gays and lesbians to begin advocating for greater rights (and participation within society) – they remain always under the shadow of possible prosecution, let alone discrimination, if they were to be publicly identified.

Male-male sexual activity remained a criminalised activity in New Zealand until the Homosexual Law Reform Act of 1986 which amended the Crimes Act 1961. While lesbian sexual activity has never been criminal behaviour in New Zealand, it has still been viewed negatively, perhaps by association with homosexuality. However, post-decriminalisation, gays and lesbians were in a position to consider matters beyond criminality, and to turn their attentions towards general personal safety within society.

Level 2 – Anti-Discrimination

Although same-sex consensual adult sexual activity had been decriminalised, discrimination against gays and lesbians remained lawful in areas such as employment, housing, education and the provision of services. Certain other groups had received protection already under the provisions of the Human Rights Commission Act 1977.¹⁴ In 1993, sexual orientation became an express ground for protection from discrimination in both the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990.¹⁵

The presence of anti-discrimination provisions, however, was not of itself the panacea leading to acceptance of gays and lesbians as “normal”

¹⁴ The original grounds of non-discrimination were: sex, marital status, religious belief, ethical belief, colour, race, and ethnic or national origin.

¹⁵ The “new” grounds, introduced in 1993 were: age, disability, political opinion, employment status, family status, and sexual orientation.

members of society. Nor did it lead to society being a totally safe place in which to be openly gay or lesbian. The implementation of anti-discrimination provisions did enable gays and lesbians to more easily “come out (of the closet)” in certain situations (to family, friends, and in some cases colleagues). At the same time, those who frowned upon gays and lesbians continued to impart homophobic messages which tend to be negative and derogatory and therefore impact negatively upon the ability of a person to come out. The time of coming out can be a most traumatic time for a gay man or lesbian woman. The process essentially involves the resolution for the individual of a conflict between the need for openness and truth about themselves, and the realities of being a member of an ostracised group within society. Negative and hurtful messages can have a range of effects, perhaps forcing someone “back into the closet”, or perhaps leading them to suicide.

In principle, however, and at a legislative level even if not in absolute practice, the safety of gays and lesbians within New Zealand society had been addressed by the introduction of anti-discrimination measures.

Level 3 – Relationship Recognition

During the 1990s, the presence of same-sex relationships became acknowledged by the law with the inclusion of provisions relating to individual partners within the relationships rather than the couple per se.¹⁶

In 2000, new relationship property legislation was passed. The Property (Relationships) Bill was subsequently divided into various Bills which resulted in amendments to the Property (Relationships) Act 1976 (relating to the distribution of property upon the breakdown of a relationship), the Administration Act 1969 (relating to distribution of property under an intestacy), Family Protection Act 1955 (relating to the distribution of property under a will), and the Family Proceedings Act

¹⁶ These statutes included the Electricity Act 1992, the Domestic Violence Act 1995, the Harassment Act 1997, the Accident Insurance Act 1998, and the Housing Restructuring (Income-Related Rents) Act 2000. For further discussion on this point and the significance of these pieces of legislation see Chapter 5.

1980 (relating to separation, dissolution, spousal maintenance and child support). This constituted a major shift in acknowledgement of the existence of same-sex relationships in that it recognised the propriety, at least to some extent, for same-sex relationships to be treated in a manner akin to that in which other relationships are treated.

Although these pieces of legislation still tended to deal with the rights of one partner vis-à-vis the rights of the other, there was indeed a sense that same-sex relationships were finally being taken seriously and being seen as valid and ‘real’ relationships.

Level 4 – Towards equal treatment

In late 2004 and early 2005, two further pieces of legislation of significance to gays and lesbians in New Zealand were passed by Parliament. First, the Civil Union Act 2004 provided that same-sex couples may register their relationships, in a manner similar to a civil marriage.¹⁷ This was followed, in early 2005, with the passing of the Relationships (Statutory References) Act 2005.¹⁸ While the former provides for a form of relationship recognition, it is the latter which provides for most of the legal consequences that flow from that recognition that were not available to same-sex couples prior to its passing.¹⁹

Up to this point, the range of legislation in New Zealand that acknowledged the existence of gays and lesbians as individuals or as partners to relationships was limited. At the time of the introduction of the Relationships (Statutory References) Bill, partners in same-sex relationships were included in 20 out of the approximately 140 statutes that applied to married couples. Partners in de facto different-sex couples were included in about 40 of those statutes.

¹⁷ The Civil Union Act 2004 was passed on 9 December 2004, but came into effect on 26 April 2005. Note that there will be a detailed discussion on the civil union versus marriage issue in Chapter 3. This is certainly not an indication that I consider civil unions to be a satisfactory form or level of relationship recognition, but merely a statement of their arrival in the legal schema.

¹⁸ The Relationships (Statutory References) Act 2005 was passed on 15 March 2005 and came into effect on 26 April 2005.

Subsequent to the above legislation coming into effect, most statutes that applied to different-sex marriage or de facto relationships also applied to same-sex civil union or de facto relationships. However, while most applicable statutory entitlements were extended to same-sex couples, there remained some key exceptions where legislation continued to ignore, and thereby deny, same-sex relationships – exceptions that were, and remain, critical in the over-all drive for full and equal treatment under the law.²⁰

Level 5 – Striving for acceptance

It is clear, however, that we have not achieved full acceptance. For any person, there is always an element of leaving behind certain aspects of the self when trying to function in a mainstream group which is different from that with which we are familiar, and to which we are accustomed. We notice this markedly when we travel overseas to a foreign country, especially where the rules of society, particularly its social and cultural customs and its language, are different from our own. This usually means that we are forced to try to conform with that “other” group in order to be understood – for survival. There is always a sense of relief when we return to that which is familiar to ourselves – our customs, our language, our “home comforts”.

I have discussed with several gay and lesbian lawyers whose work place is a corporate law firm, how they feel when they enter the doors to work each morning. One of these people told me that she felt she had multiple personalities. On Friday night, she might be a lesbian woman, attending a “wimmins’ dance”. On Saturday, she might be a Māori woman, attending a hui with other members of her hapū back at the home marae. On Saturday night, she might be a lesbian Māori woman, socialising with friends to whom she had come out. But when it came to Monday morning and she walked back in the doors to the firm – she was a lawyer. As an individual she was still a woman, she was still Māori, she was still a lesbian. But, in the work culture within which she now placed

¹⁹ For more detail see discussion in Chapter 6.

herself, she might be seen to be Māori and a woman to the extent that that did not interfere with being a lawyer. She certainly was not seen as lesbian.²¹

For any gay man or lesbian woman, this is what it feels like most of the time. As a gay man, I am not fully a member of society. If I wish to be a part of society, I must leave some, or all, of that “gay” part of me behind and “pretend” to be merely “a man”. When I get on the bus, I am a “man” only. I cannot walk down the street holding hands with my partner (certainly not safely). In practical terms, I can only be a gay man to the extent to which I can “come out”, and that varies in different situations generally based on my assessment of what is “safe” in any given environment. Even more importantly, I can only “come out” and be a gay man to the extent that the law and social acceptance will allow. That is, my citizenship is based on what my family, friends, colleagues, acquaintances, or even strangers, will allow. This is the hidden reality. As a gay man, I am only able to access or exercise certain rights to the extent permitted by the society in which I live, and my citizenship depends on the goodwill of others.²²

Gay men have always had relationships; we just never had permission to.

Where that society chooses to deny any person their rights, and curtails the ability to participate fully and equally in society, that person’s being, as a member of society, is limited:²³

Formal declarations of equality are not enough to remove discrimination and exclusion. Indeed, they may perpetuate them. Formal equality is the equality of "separate but equal". The group is hived off, labeled "different", and told that they are equal with one important qualification – equal within their designated sphere. Cloaked by the facade of formal equality, group difference perpetuates denial.

²⁰ There will be more detailed discussion of this in Chapters 6 and 9.

²¹ Changes, not affecting the core message of this passage, have been made to this story to protect the identity of the individual who expressed this view to me. permission was also granted to utilise this example in this thesis.

²² Harvey Fierstein, in Michael Portantieri, “Interview With Harvey Fierstein”, [AfterElton.com](http://www.afterelton.com) (Retrieved: 26 March 2008): <http://www.afterelton.com/people/2998/3/harveyfierstein>.

²³ McLachlin, Chief Justice of Canada, “The Civilization Of Difference”, Lecture delivered in Toronto on 7 March 2003 and subsequently published in [The Globe and Mail](#) (8 March 2003).

This difference between living as a gay man within society, or living as a gay citizen of society is fundamental. That is, should I be able only to participate in decriminalised activities – and be tolerated; or should I be able to participate fully in a meaningful (valid and valued) way in society – and be accepted? It is the difference between, on the one hand, being able to operate merely on a personal level as a gay or lesbian person (as an individual and in personal relationships – behind closed doors) and, on the other hand, being able to participate in all aspects of society without prejudice on the basis of sexuality (socially, emotionally, physically, spiritually, culturally). It is the difference between the State decriminalising homosexuality so that a gay man does not get locked in prison because he is homosexual, as compared with the State supporting same-sex relationships, and the parties to those relationships, by providing them with access to the same status and protections (and obligations) that it provides to partners in different-sex relationships:

On the one hand there are those who would disdain full and equal acceptance:²⁴

What we did hope would arise from the Homosexual Law Reform Act was that New Zealand would become a tolerant society towards the homosexual community. My position is that we should extend our tolerance to them. ... the principal concern I have with this bill, and the reason why I strongly oppose it, is that it is completely unnecessary for the State to take the next step in the process, and that is to try to declare that that activity is, of itself, moral. The State must be making that statement when it decides, by legislation, to give State sanction and State blessing to unions between two people of the same sex.

On the other hand, there are those, like myself, who advocate that equal recognition of the core same-sex partnership relationship is a vital part of the over-all schema of achieving a sense of social belonging, as a gay person, within society. It is my contention that, by being denied equal recognition of our relationships, gays are being denied the fulfilment of a sense of belonging. The fact that not all gay and lesbian people may want to live in a relationship, or the fact that not all might want their

relationship recognised in the same way, does not detract from this notion. It is the entirety of the acceptance of gays and lesbians by wider society, and the ability of gays and lesbians to have access to the same range of choices as their peers that concretises a person's sense of belonging, regardless of what individual choices may result.

Civil unions and the raft of new legislative provisions that have been added to those already in place are helping to secure a place for gays and lesbians, and their relationships within New Zealand society. But, it is a place that has been decided by majority agreement and, sadly, is not a place where all gay and lesbian persons might wish to be.

Self-actualisation means being able to reach full potential in all areas of one's individual life – professionally, culturally, spiritually, educationally, personally, individually and in interactions with family, friends, colleagues, and socially.

Acceptance means being able to reach full potential in all areas of societal life – professionally, culturally, spiritually, educationally, personally, individually and in interactions with family, friends, colleagues, and socially.

Until gays and lesbians have full citizenship, and until gays and lesbians have full equality of treatment under the law as individuals, in their relationships, and as families, we cannot possibly say that we have reached our potential. No matter how hard we may try to deny or ignore them, the negative messages, which flow from less than equal treatment under the law, undermine our ability to reach our goal of full acceptance – the actualisation of our ideal place in society.

In New Zealand gays have successfully negotiated the decriminalisation obstacle, and gays and lesbians have successfully overcome the discrimination hurdle (in the law, and in theory, at least). We have been granted the personal and property rights of partners to relationships when those relationships come to an end. We have been granted a formal, politically pragmatic, legislative recognition of our relationships.

²⁴ Gordon Copeland (MP for United Future), Hansard: Parliamentary Debates, Third Reading of the Civil Union Bill (8 December 2004).

What we have not yet achieved, and what society has not yet deigned to give us, is full participation in society through the equal recognition of our ability to form caring and committed relationships and the equal recognition of our ability to form caring and committed families. Furthermore, we have not yet received acknowledgement that these relationships are meaningful and positive not only to us as gays and lesbians ourselves (as they are already) but that they are meaningful and positive to society as a whole. When we have achieved that, we will have moved closer to achieving full acceptance, an equal place in society, and a true sense of being.

HUMAN RIGHTS

Introduction – Human Rights?

In its very simplest form, discrimination can be defined as arbitrarily less favourable treatment of a person or group of persons resulting in detriment to them.²⁵

In reality, however, discrimination is a very complex notion. It is not possible to define discrimination in isolation from other concepts. In fact, it may be somewhat more productive to consider discrimination in terms of its relationship with other concepts – for example, equality, in its broadest sense, can be seen as the absence of discrimination. In this context, human rights, as they have evolved, can be seen as tools to be employed in the elimination of discrimination or the achievement of equality – incorporating notions of reasonableness and balance.

²⁵ In this thesis, I employ the term “discrimination” to mean “unjustified discrimination” (see discussion on assessing discrimination’ in Chapter 7). Other commentators use the term “discrimination” more widely, referring to “unjustified discrimination” (what I would refer to as “discrimination”), and “justified discrimination” (what I would refer to as “different treatment”). For example, the New Zealand Human Rights Commission defines the term discrimination as follows: “Discrimination occurs when a person is treated differently from another person in the same or similar circumstances. Discrimination is not always unlawful. ... Discrimination is only unlawful when it occurs on one of the prohibited grounds and in one of the prohibited areas of public life. The Act also defines a number of circumstances where discrimination is not unlawful”. I do not adhere to this use of the terminology, and I consider the term “justified discrimination” to be oxymoronic.

A brief history

To a large extent, the origins of modern human rights laws can be attributed to a desire for equality in the face of the growth of perceived and actual privilege in modern Western society.²⁶

Protections against discrimination based on birth and social origin take us back to the beginning of the modern Western struggle for human rights against democratic privilege.

Early rights were attributed largely on the basis of birth status which ostensibly meant on the basis of property ownership.²⁷

... until 1815, only those white males who owned property or paid taxes could vote; not allowed to vote were white males who did not own property; all women; all African Americans, including nonslaves; and all Native Americans.

Although there was a definite consciousness of some human rights issues earlier, World War II was a significant watershed with regard to human rights recognition and development. Prior to this point, there had been some embryonic recognition of human rights issues, but there had been no organised or concerted effort to deal with these imperatives. Modern human rights imperatives and legal frameworks have grown over a relatively short period of time.

From about the mid-20th century up to the present day, human rights have achieved a visibility and a strength of presence within social, legal and political settings. This has transitioned through:

- a period of concentration on the identification of rights and the formulation of the various international conventions on human rights to encapsulate those rights.²⁸

²⁶ Donnelly, J, Universal Human Rights In Theory And Practice, 2nd Edition, Cornell University Press, New York, USA (2003): 227.

²⁷ Ropers, Richard H., and Pence, Dan J., American Prejudice: With Liberty and Justice For Some, Plenum Press, New York (1995): 16; cited in Donnelly, J, Universal Human Rights In Theory And Practice, 2nd Edition, Cornell University Press, New York, USA (2003): 227.

²⁸ Approximately 1950-1966: See Symonds, Janusz, Human Rights: Concepts And Standards, UNESCO Publishing, England (2005): 10.

- a consideration of the role of Member States in ‘promoting universal respect for, and observance of, human rights and fundamental freedoms’, and the building of treaty-based institutions – for example, in the mid-to-late 1970s, the United Nations Human Rights Committee and the Committee on the elimination of Racial Discrimination (CERD);²⁹ and
- a greater emphasis on compliance and enforcement.³⁰

Over this period also, different groups came to the fore seeking the elimination of the discriminatory behaviours perpetrated against them. While it is impossible to delineate in any absolute way the progressive classes of persons whose claims came to be heard, they can be listed in general terms. The progressive grounds:³¹

- slavery and colonialism;
- race, ethnicity and gender – including issues of property ownership, personhood, etc;³²
- (modern) religious persecution (Jews, non-conformist Christians, etc);
- indigeneity; and
- age and disability.

²⁹ Approximately 1966-1985: See Symonds, Janusz, Human Rights: Concepts And Standards, UNESCO Publishing, England (2005): 13-14.

³⁰ Approximately 1985-Present: See Symonds, Janusz, Human Rights: Concepts And Standards, UNESCO Publishing, England (2005): 17.

³¹ Donnelly, J, Universal Human Rights In Theory And Practice, 2nd Edition, Cornell University Press, New York, USA (2003): 228. Note also the timing and sequence of the adoption of / entering into force of some of the international human rights conventions: 1926 – Convention to Suppress the Slave Trade and Slavery (League of Nations); 1951 – Convention on the Prevention and Punishment of the Crime of Genocide; 1969 – International Convention on the Elimination of All Forms of Racial Discrimination (ICERD); 1979 – Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); 1990 – United Nations Convention on the Rights of the Child (UNCROC); 2008 – Convention on the Rights of Persons with Disabilities.

³² Hughes, Vivien, “How The Famous Five In Canada Own Personhood For Women”, in [2001/02] 17 London journal of Canadian Studies 80: 80: “In 1929, five Canadian women won a ruling by the Judicial Committee of the British Privy Council that women were persons in law”.

Beverley McLachlin stated:³³

As we approach the twenty first century, human rights are emerging as the dominant ethic. All over the world even where they are observed more in breach than in practice, they are accepted as the fundamental norm upon which liberal democracy is founded.

In July 2006, a conference focussing on lesbian, gay, bisexual and transgender human rights issues was held in Montreal, Canada.³⁴ Numerous previous international conferences had been held on “gay and lesbian” rights issues. Significantly, however, this conference was consciously and deliberately about the “human rights” of gays and lesbians (and bisexual and transgender people). The conscious placement of these issues into the human rights arena rather than keeping them in the gay and lesbian rights arena was designed to recognise and emphasise the fact that amongst gay and lesbian activists, and amongst gay and lesbian legal advocates and legal academics, and indeed amongst persons involved in human rights issues generally, there is a strong sense that the human rights of sexual minorities are the most pressing and most predominant rights issues still remaining in the early 21st century.

The formally drafted “Declaration of Montreal”, which was put before the conference for its consideration and endorsed in full by the 1500 or so attendees before the conference concluded is also a reflection of this shift. In part, the Preamble of the Declaration states that:³⁵

The world has gradually accepted that individual human beings have different sexes, racial or ethnic origins, and religions, and that these differences must be respected and not be used as reasons for discrimination. But most countries still do not accept two other aspects of human diversity: that people have different sexual orientations and different gender

³³ McLachlin, Beverley, “The Canadian Charter And The Democratic Process”, in Gearty, Conor, and Tomkins, Adam, (Eds), Understanding Human Rights, Pinter, London (1996), 20: 20.

³⁴ The writer was present for the duration of this Conference – including attending all plenary and keynote sessions, and presenting a workshop on New Zealand’s Civil Union Act 2004 as a response to the human rights imperatives of New Zealand domestic legislation.

³⁵ From the Preamble to the “Declaration Of Montreal” endorsed by participants of the International Conference On LGBT Human Rights, Montreal, Canada (July 2006).

identities; that two women or two men can fall in love with each other; and that a person's identity, as female or male or neither, is not always determined by the type of body into which they were born.

This same concept of gay rights as human rights has been further supported and consolidated through the “Yogyakarta Principles”, developed by “a distinguished group of international human rights experts” who met in Yogyakarta, Indonesia, in 2006. These “Principles” address a broad range of human rights standards and their application to issues of sexual orientation and gender identity. In a press release with regard to the “Principles”, Sonia Correa stated:³⁶

Human rights are for everyone, without reservation, yet women, men and persons whose sexuality does not conform with dominant norms face rape, torture, murder, violence, and abuse because of their sexual orientation or gender identity. These Principles affirm that human rights admit no exceptions.

One of the key issues relating to the emergence of the rights of sexual minorities as ‘the most pressing and most predominant rights issues still remaining in the early 21st century’ is that these groups are not seeking new rights or special treatment, but rather seeking access to those rights that other take for granted:³⁷

Rights of sexual orientation are fundamental human rights. Or, more precisely, some rights of sexual orientation are fundamental human rights, even if others are not. Among those which are, a core of fundamental rights of sexual orientation derives from the extant corpus of international human rights. That fundamental core need not be created and introduced into the human rights system as a categorically new set of rights. it derives from extant rights and is thus necessary to their realization.

It is interesting to note that post-colonial New Zealand was a world leader in addressing some of these early human rights issues. Firstly, at a theoretical level, New Zealand's 1853 electoral franchise extended the

³⁶ “Experts Release Groundbreaking Principles On Sexual Orientation, Gender Identity, And Human Rights: ‘Yogyakarta Principles’ Call For Action World-Wide Against Discrimination And Abuse”, International Service for Human Rights and the International Commission of Jurists, Press Release, Geneva (26 March 2007).

³⁷ Heinze, Eric, Sexual Orientation – A Human Right: An Essay On International Human Rights Law, Martinus Nijhoff Publishers, Boston (1995): 23.

vote to Māori.³⁸ In 1867, Māori electorates were established to give wider effect to Māori electoral franchise with all Māori men over the age of 21 being able to vote. In 1893, enfranchisement was extended to all women over the age of 21 – regardless of property ownership. New Zealand became the first national jurisdiction in the world to extend the vote to women.³⁹

It is interesting to note also that, although we in New Zealand had the opportunity to be a world leader again, when the same-sex marriage issue was put fairly and squarely on the nation's agenda in April 1996 in the High Court in Auckland, we chose not to take up that challenge. Instead we decided to trail behind other jurisdictions by enacting, while Canada and The Netherlands had already endorsed same-sex marriage, a partnership registration system similar to that enacted by Denmark in 1989 – some 15 years earlier.

Categorisation of rights

It is a product of human nature that as we attempt to understand anything, we tend to try and put things into boxes – discernible categories – and, more often than not, try to make sense of those categories by reference to the familiar.

The first of these practices can have some benefit in relation to the fundamental question: What is discrimination? However, the practice of categorisation and classification can, if undertaken injudiciously and for the wrong purpose, have a detrimental effect.

It is useful, however, to consider various attempts to categorise as a means to understanding the current approach to dealing with discrimination.

³⁸ In reality, because Māori land was owned communally, very few Māori met the individual property ownership or leasehold requirement. In 1859 the British Crown Law office confirmed that Māori could not vote unless they had individual title granted by the Crown.

³⁹ Governor, Lord Glasgow, signed the Electoral Act into law on 19 September 1893.

Generations of Rights

Linked with the above development of international human rights legislation over time, and led by the wording of the international conventions themselves, there has been a natural tendency to categorise the rights encapsulated in those conventions into ‘generations’:

- First Generation Rights – essentially those rights contained in the International Covenant on Civil and Political rights (ICCPR);
- Second Generation Rights – essentially those rights contained in the International Covenant on Economic Social and Cultural Rights (ICESCR); and
- Third Generation Rights – essentially the rights of indigenous peoples (as contained in, for example, the Draft Convention on the Rights of Indigenous Peoples).

Positive and Negative Rights

A further attempt to understand the human rights framework, led to the development of a division into ‘positive’ rights and ‘negative’ rights:

- Positive Rights – Positive rights are those rights that grant access to a good. They are the rights to something. They include, for example, the right to an education and the right to appropriate healthcare. In the main, but not exclusively, positive rights can be aligned with second-generation rights. In this case, the fact that an individual has a right to healthcare does not mean that others must ensure that the individual receives the care available. There remains an onus on the individual to access the healthcare that has been made available.
- Negative Rights – Negative rights provide for the freedom from certain things. They include, for example, the right to be free from torture or free from discrimination. In general terms, but again not exclusively, negative rights can be aligned with first generation rights. In this case, there is a distinct obligation that falls on others. Others have a responsibility to refrain from committing acts that contravene the imperatives set down by the particular human rights provisions. To a

large extent, the ability of one individual to access, or to exercise his or her right(s), relies on the actions of others. For example, for an individual to be free from torture requires that others do not torture him or her. In this sense, it is incumbent on others to respect the enumerated rights and to refrain from acting to limit or negate them and, where necessary, to act positively to ensure that the relevant rights are extended to members of the protected group.

Formal and Substantive Rights

There has also been a good deal of consideration given to the tension between equality of treatment as compared with equality of result, the general consensus being that neither, on its own, adequately responds to the equality imperatives.

- Formal Equality (equality of treatment) – This is described as the “sterile legal equality of treating likes alike”.⁴⁰
- Substantive Equality (equality of result) – This is described as “ameliorative equality aimed at rectifying the legal disadvantages which members of certain groups suffer in our society”.⁴¹
- Equality of Opportunity (in essence, a combination of formal equality and substantive equality) – This provides recognition that if the treatment afforded to individuals is the same in all cases, but that those individuals set out from different points, they will also all end up at different points. Conversely, if we concentrate only on equality of result, we reject the right of individuals to be treated as individuals in the face of “a utilitarian emphasis on outcomes”. Equality of opportunity suggests a recognition of individual needs, where this is appropriate and necessary, and greater adherence to the principal of equal treatment culminating in greater equality of result.⁴²

⁴⁰ McLachlin, Beverley, “The Canadian Charter And The Democratic Process”, in Gearty, Conor, and Tomkins, Adam, (Eds), Understanding Human Rights, Pinter, London (1996), 20: 22.

⁴¹ McLachlin, Beverley, “The Canadian Charter and the Democratic Process”, in Gearty, Conor, and Tomkins, Adam, (Eds), Understanding Human Rights, Pinter, London (1996), 20: 22.

⁴² Fredman, Sandra, “Discrimination Law”, Oxford University Press Inc, New York (2002): 14.

'Old' and 'new' rights

It was interesting that, in New Zealand during the “Consistency 2000” process, repeated reference was made to the “old” grounds and the “new” grounds as contained in the Human Rights Act 1993. The “old” grounds were those that had been included in the previous Human Rights Commission Act 1977,⁴³ and the “new” grounds were those that had now been added by virtue of the Human Rights Act 1993.⁴⁴ This distinction had the potential to undermine the effectiveness of the new legislation and to create a hierarchy of rights on the basis that there was an implication that, by virtue merely of being more firmly ‘established’, the “old” rights had greater validity than the “new” rights.

The concept of duties

Sandra Fredman questions the “traditional division” between civil and political rights and socio-economic rights, suggesting that, in fact, these two types of rights are “inextricably intertwined”.⁴⁵ She argues that they both give rise to positive obligations on the part of the State. A blind adherence to welfarism, she infers, gives rise to the impression and perhaps an expectation that the State will play the role of “unidirectional provider” with the rights bearer being merely a “passive recipient”. There is also an implication that a rights-based analysis gives rise to a perception that all rights can be claimed directly rather than indirectly – that is, for example:

- that there is a perceived right to education, rather than a right to access education services (and therefore a duty to provide education services);
- that there is a perceived right to good health, rather than a right to access health services (and therefore a duty to provide health services); and

⁴³ These included: sex; marital status; religious or ethical belief; race and colour; ethnic and national origins; and age (in employment only).

⁴⁴ These included: disability; age; political opinion; employment status; family status; sexual orientation.

⁴⁵ Fredman, Sandra, “Human Rights Transformed: Positive Duties And Positive Rights”, [2006] Public Law 498: 499.

- that there is a perceived right to housing, rather than a right to access housing services (and therefore a duty to provide housing services).

In this context she postulates that the analyses based in generational rights and in positive and negative rights should give way to an analysis based in a series of duties, namely:⁴⁶

- Primary Duties – whereby the State has an obligation not to interfere;
- Secondary Duties – whereby the State has an obligation to protect individuals against the actions of other individuals; and
- Tertiary Duties – whereby the State has an obligation to facilitate or provide.

The notion of rights and the notion of re-shaping of rights into primary, secondary and tertiary duties, still tend to focus on equality- and rights-based treatments on an individualised, case-by-case basis.

Further, what has tended to happen is that the law has developed:⁴⁷

along a hierarchical linear model which affords protection first to one category of persons and later extended protection, not necessarily to the same or similar extent of coverage, to other categories, in part due to societal recognition of disadvantage and in part in response to demands made by pressure groups and their coalitions of supporters. In the absence of a general, indivisible, approach to equality, individuals must establish a premise of difference based on unitary or 'essentialist' classifications ...

More recently, therefore, the move was one towards the recognition of 'fourth generation' duties which:⁴⁸

move beyond the individualised fault-based model of anti-discrimination law and instead impose positive duties on states, public bodies, employers and other decision makers to introduce equality measures and structural changes.

⁴⁶ Fredman, Sandra, "Human Rights Transformed: Positive Duties And Positive Rights", in [2006] *Public Law* 498: 500.

⁴⁷ Kenner, Jeff, "Combating Discrimination – New Concepts, New Laws, New Hierarchies?" in *EU Employment Law: From Rome To Amsterdam And Beyond*, Hart Publishing, Portland, Oregon (2003): 425.

⁴⁸ Kenner, Jeff, "Combating Discrimination – New Concepts, New Laws, New Hierarchies?", in *EU Employment Law: From Rome To Amsterdam And Beyond*, Hart Publishing, Portland, Oregon (2003): 426.

Rather than attempting to address specific breaches of human rights or anti-discrimination legislation, fourth generation duties introduce a more systemic approach to countering discrimination by:

- imposing a positive duty to promote equality – rather than simply refraining from discriminating;
- imposing a duty (public and private) to develop positive plans to dismantle institutional [discrimination];
- moving beyond the fault-based model of existing discrimination provisions;
- recognising that societal discrimination extends well beyond individual acts of discrimination;
- recognising that the duty is not simply one of providing compensation for an individual victim; and
- recognising that positive action is required to achieve change, whether by encouragement, accommodation, or structural change.

The greatest shift, under a fourth generation duties approach, is that the responsibility for ensuring the promotion of equality for all rests with those with the power to bring about change. This, as opposed to the responsibility resting with those who are claiming the rights.

Another of the more significant characteristics of the fourth generation duties approach is the fact that the affected groups become involved, proactively, in the diagnostic processes, the development of options for strategies to deal with issues that may have been identified, the decision-making itself, and the monitoring and evaluation of the strategies adopted.

Under the former ‘standard’ approach, Governments have tended to respond to human rights imperatives based on their own desires for political survival rather than on their respect for the needs and rights of the affected groups.

Direct participation by the affected groups tends to move beyond individual acts of prejudice and promotes systemic and structural change. This participation at a prospective and proactive level has the added benefit of creating more accepted and enduring strategies for the promotion of acceptance.⁴⁹

If participation is built in as a central aspect of such duties, not only is it likely that strategies will be more successful, but the very process of achieving equality becomes a democratic one.

Whereas:⁵⁰

... any attempt to encapsulate the content of minority rights without active participation of the groups in question will be patronizing, erroneous, and unlikely to succeed.

These various attempts to categorise have come to be questioned, however. While categorisation can be a helpful tool in the process of understanding, it can also lead to the further hierarchising of rights in terms of the category that is the focus at any given time.

A new approach

It can be helpful to list or categorise in order to enable the human mind to 'manage' its understanding of rights, discrimination and equality. However, there is a very real danger that comes with categorisation whether that categorisation be based on the chronological order in which classes of rights came to the fore, or whether it be based on issues of affordability, or based on factors related to political will. That danger rests in the fact that, inevitably, categorisation will result in the recognition of some rights over others, or the hierarchising and prioritising of rights.⁵¹

Firstly, allocating human rights to particular categories inevitably creates artificial distinctions that tend to compartmentalise human rights. This has

⁴⁹ Fredman, Sandra, "Discrimination Law", Oxford University Press Inc, New York (2002): 123.

⁵⁰ Fredman, Sandra, "Discrimination Law", Oxford University Press Inc, New York (2002): 123.

the effect of eroding the notions of indivisibility, universality and interdependence of human rights. ... Secondly, there is a danger of perceiving different categories of human rights as static rigid definitions rather than simple divisions with permeable conceptual boundaries between them. Categories of human rights might this be seen as representing distinct definitions of different types of rights rather than different aspects of the totality of rights.

If we take, as an example, the labelling of rights as first-, second-, or third-generation rights, we are able to discern some of the potential problems with such labelling.

- prioritisation based on the order in which those rights emerged – tending to delay, sideline or marginalise other ‘generations’ of rights;⁵²
- immediately enforceable and justiciable (ICCPR) versus progressively realised and not amendable to immediate protection (ICESCR);⁵³
- some rights do not fit comfortably into any one particular ‘generation’ – may fall comfortably into none, or may fall across more than one);⁵⁴ and
- such categorisation can be seen as fuelling the debate on individualism and collectivism (first generation – individual) (second and third generation – collective) – an raising questions of justiciability.⁵⁵

⁵¹ Mubangizi, John C., “Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context”, in [2004] 4 African Human Rights Law Journal 93: 96-97.

⁵² Mubangizi, John C., “Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context”, in [2004] 4 African Human Rights Law Journal 93: 98.

⁵³ Mubangizi, John C., “Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context”, in [2004] 4 African Human Rights Law Journal 93: 99.

⁵⁴ Mubangizi, John C., “Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context”, in [2004] 4 African Human Rights Law Journal 93: 99.

⁵⁵ Mubangizi, John C., “Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context”, in [2004] 4 African Human Rights Law Journal 93: 99.

Article 5 of the Vienna Declaration and Programme of Action provides:⁵⁶

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

And, the New Zealand Human Rights Commission states:⁵⁷

Human rights are inherent, inalienable, universal, indivisible and interdependent. They are inherent, in that they belong to everyone because of their common humanity. They are inalienable, in that people cannot give them up or be deprived of them by governments. They are universal, in that they apply regardless of distinctions such as race, sex, language or religion. They are indivisible, in that no right is superior to another. They are interdependent, in that realisation of one right contributes to the realisation of other rights.

Inherent

The Office of the High Commissioner for Human Rights states that:⁵⁸

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination.

That is, individuals are due their human rights on the basis that they are human – there need be no other qualification. Additionally, and as a

⁵⁶ “The Declaration of the World Conference on Human Rights” (The ‘Vienna Declaration’), Vienna, (A/CONF.157/23, 12 July 1993).

⁵⁷ Human Rights Commission website, <http://www.hrc.co.nz/home/hrc/abouthumanrights/abouthumanrights.php> (Retrieved: 29 July 2008).

⁵⁸ Office of the High Commissioner for Human Rights, “What Are Human Rights?”, <http://www.ohchr.org/EN/Issues/WhatAreHumanRights.aspx> (Retrieved: 11 August 2008).

logical extension of that point, human rights:⁵⁹

should be enjoyed by all people, regardless of their social status or their geographical or regional location. Political, economic and cultural differences cannot and should not be used as an excuse for the denial or violation of human rights.

Inalienable

Human Rights are considered inalienable, meaning that they are constituted of individual rights that by their nature cannot be taken away, violated, or transferred from one person to another. They include such rights as the right to life, the right to liberty, and the right to the pursuit of happiness. The Office of the High Commissioner for Human Rights states that:⁶⁰

Human rights are inalienable. They should not be taken away except in specific situation and according to due process. For example, the right to liberty may be restricted if a person is found guilty of a crime by a court of law.

Such rights are not negotiable and not conditional, except in confined circumstances as above, and are more fundamental than, for example, property rights (that can be given away, or transferred from one person to another).

Universal

The Office of the High Commissioner for Human Rights states that:⁶¹

The principle of universality of human rights is the cornerstone of international human rights law. This principle, as first emphasized in the

⁵⁹ Mubangizi, John C., "Towards A New Approach To The Classification Of Human Rights With Specific Reference To The African Context", in [2004] 4 African Human Rights Law Journal 93: 94.

⁶⁰ Office of the High Commissioner for Human Rights, "What Are Human Rights?", <http://www.ohchr.org/EN/Issues/WhatareHumanRights.aspx> (Retrieved: 11 August 2008).

Universal Declaration on Human Rights in 1948, has been reiterated in numerous international human rights conventions, declarations and resolutions. The 1993 Vienna World Conference on Human Rights, for example, noted that it is the duty of States to promote and protect all human rights and fundamental freedoms, regardless of their political, economic and cultural systems.

There has been, at the same time, some debate about whether, at all times and in all circumstances, rights can be universal. There are arguments, for example, that certain cultural imperatives may drive the need for some rights, upheld strenuously in some countries, not to be observed in other countries.⁶²

Cultural relativism is the assertion that human values, far from being universal, vary a great deal according to different cultural perspectives. Some would apply this relativism to the promotion, protection, interpretation and application of human rights which could be interpreted differently within different cultural, ethnic and religious traditions. In other words, according to this view, human rights are culturally relative rather than universal.

On the other hand, however:⁶³

Simply assuming fundamental cultural difference, not to nuance generalized models but to dismiss them out of hand is as culturally imperialistic in its relativism as uncritical obedience to generalized models would be imperialistic in its absolutism.

Essentially, there is a need to balance, in some way, the tension between universality and relativism. There are different ways in which this can be achieved (for example, consciously and with lawful justification, States could raise certain cultural imperatives above international human rights imperatives).

⁶¹ Office of the High Commissioner for Human Rights, "What Are Human Rights?". <http://www.ohchr.org/EN/Issues/WhatareHumanRights.aspx> (Retrieved: 11 August 2008).

⁶² Ayton-Shenker, Diana, "The Challenge Of Human Rights And Cultural Diversity", United Nations Background Note, <http://www.un.org/rights/dpi1627e.htm> (Retrieved: 8 August 2008).

⁶³ Heinze, Eric, Sexual Orientation – A Human Right: An Essay On International Human Rights Law, Martinus Nijhoff Publishers, Boston (1995): 26.

Interdependent and indivisible

The Office of the High Commissioner for Human Rights states that:⁶⁴

All human rights are indivisible, whether they are civil and political rights, such as the right to life, equality before the law and freedom of expression; economic, social and cultural rights, such as the rights to work, social security and education; or collective rights such as the right to development and self determination, are indivisible, interrelated and interdependent. The improvement of one right facilitates advancement of the others. Likewise, the deprivation of one right adversely affected the others.

In an address to the United Nations Commission on Human Rights, the then Secretary-General of the United Nations, stressed that human rights are universal and indivisible, whether they are civil, political, economic, social or cultural, and:⁶⁵

... must be upheld with equal determination in every country. And that means looking beyond cultural differences – to recognize, for example, that the rights of women on one continent are the rights of women on every continent”.

Summary

The human rights climate that is currently being created is one which values concepts of inclusivity and balance.

It is a climate which recognises and values equality consisting of:

- equal treatment;
- personal autonomy;⁶⁶ and

⁶⁴ Office of the High Commissioner for Human Rights, “What Are Human Rights?”, <http://www.ohchr.org/EN/Issues/WhatareHumanRights.aspx> (Retrieved: 11 August 2008).

⁶⁵ Annan, Kofi, Address to the Commission on Human Rights”, Geneva (24 April 2003).

⁶⁶ That is, to the fullest extent possible without impinging unreasonably on the rights of others.

- balance – between “excessive individualism on one hand and majoritarian rule on the other”.⁶⁷ When reflecting on the ‘usefulness’ of the Canadian Charter, Beverley McLachlin states that:⁶⁸

... a charter of rights strikes a balance between the will of the majority as expressed through the legislatures and the rights of the individual as defined by law and the courts; a balance between the concepts of legislative supremacy and guaranteed fundamental rights.

Further:⁶⁹

[L]iberal democracy is a broad and flexible concept. It is capable of embracing various roles for government and the individual. At its outer edges, liberal democracy is threatened by totalitarianism and nihilism. Totalitarianism, the tyranny of the majority, imposes absolute government control upon the citizenry; nihilism and gross individualism lead to the total rejection of community institutions and values. Both extremes are to be feared.

Discrimination against gays and lesbians, and gay and lesbian rights issues, have been seen formerly as the responsibility of gays and lesbians. Rights issues that have been raised by gays and lesbians have often been viewed, by others, as gays and lesbians seeking special or preferential treatment. In recent years, a recognition has been growing that gay and lesbian rights are, in fact, human rights. It has been said that the last significant human rights battle is the battle currently being undertaken by gay and lesbian groups for access to those same rights that are enjoyed by other in society.

The “Montreal Declaration” represented a conscious effort to clearly portray gay and lesbian rights as human rights. Similarly, the drafting of the “Yogyakarta Principles” served to reinforce and consolidate this

⁶⁷ McLachlin, Beverley, “The Canadian Charter And The Democratic Process”, in Gearty, Conor, and Tomkins, Adam, (Eds), Understanding Human Rights, Pinter, London (1996), 20: 21.

⁶⁸ McLachlin, Beverley, “The Canadian Charter And The Democratic Process”, in Gearty, Conor, and Tomkins, Adam, (Eds), Understanding Human Rights, Pinter, London (1996), 20: 21.

⁶⁹ Stamatakos, P.S., “The Bar In America: The Role Of Elitism In A Liberal Democracy”, in [1992-93] 26 University of Michigan Journal Of Law reform 853: 873-4; quoted in McLachlin, Beverley, “The Canadian Charter And The Democratic Process”, in Gearty, Conor, and Tomkins, Adam, (Eds), Understanding Human Rights, Pinter, London (1996), 20: 21.

message, with the Principles being:⁷⁰

... intended as a coherent and comprehensive identification of the obligation of States to respect, protect and fulfil the human rights of all persons regardless of their sexual orientation or gender identity.

The Yogyakarta Principles are not intended to be aspirational, and are not intended to introduce any new principles:⁷¹

The basic premise is that lesbians, gay men, bisexuals, transgendered people and intersexuals are all human beings and are equally entitled to human rights. The development of international human rights law has largely ignored them – as racial minorities were once ignored – as women were once ignored – as the disabled were once ignored. So it is logical to state established international human rights principles and suggest how these principles apply to the situation of LGBTI people.

CITIZENSHIP AND HUMAN RIGHTS

Considerations of citizenship and discrimination go hand in hand. Perhaps the most lucid statement of this in the New Zealand context is that of Thomas J in Quilter when he stated that:⁷²

Based upon this personal characteristic, gays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. In a real sense, gays and lesbians are effectively excluded from full membership of society.

This thesis is essentially a consideration of the denial of access to marriage by same-sex couples as an example of discrimination in New Zealand. When considering discrimination in relation to marriage, it is

⁷⁰ The “Yogyakarta Principles on the Application of Human Rights Law in Relation to Sexual Orientation and Gender Identity” (launched on 26 March 2007).

⁷¹ Sanders, Professor Douglas, “The Role Of The Yogyakarta Principles”, (4 August 2008).

important to understand that the law is applied various effective levels. This thesis will examine each of the following:

- access to the incidents of marriage;
- access to the institution of marriage itself;
- access to the status that marriage brings;
- access to the broader symbolism that access to the institution of marriage brings; and
- the even broader notion of human dignity, respect, and care and concern that equal treatment brings.

We cannot say that we have fully attained even the first of the above elements, let alone any of the subsequent ones. That is, same-sex couples, even with the advent of the Civil Union Act 2004, still cannot access all the entitlements that different-sex couples can access through marriage.⁷³

Same-sex couples have committed relationships, many have children, many are caring for elderly parents, and many are active in church communities. They live in mainstream America but are not treated as mainstream Americans.

True, the Government of New Zealand introduced a regime that enabled same-sex couples who so choose to formally register their relationship. In parallel with this (or shortly thereafter) the Government of New Zealand also extended most of the incidents of marriage to same-sex couples who choose to enter into a civil union. Further, same-sex couples who choose not to enter into a civil union are treated in the same way by the law as are different-sex couples who choose not to enter into a civil union or into marriage.

Government would argue that the provision of access to civil unions was a demonstration of its commitment to ensuring that same-sex couples, as an affected group, are provided equal access to equal entitlements in the law.

⁷² *Quilter v Attorney-General* [1998] 1 NZLR 523: 537.

⁷³ Carlson-Wallrath, Sarah, "Why The Institution of Civil Marriage Must Be Extended To Same-Sex Couples", [2004-05] *Hamline J Pub L & Pol* 73: 75.

However, this does not remove the fundamental issue that same-sex couples still do not have access to marriage. Formal equality may have been extended to same-sex couples by way of access to a range of statute-based entitlements.

The provision of civil unions and a range of marriage-like incidents that flow from civil unions has not provided same-sex couples with equality of opportunity. The refusal, on arbitrary grounds, to provide access to a specific right sends a much broader message than just the mere fact of that refusal. The refusal to provide access same-sex couples with access to marriage conveys the message to those couples, to other gays and lesbians, and to society at large, that gays and lesbians are not worthy of the same respect, dignity, and care and concern, that are different-sex couples. The institution of marriage is reserved and preserved for those couples who are worthy of it, and for those couples only. The message is one of insult to gays and lesbians. It is the violent message of exclusion. It is an affront to the dignity of gays and lesbians and individuals, and to same-sex couples and their families.

In essence, if a person is treated less favourably than another person, without valid reason, and that less favourable treatment restricts them from participating in their society in the same way as all other citizens, then their citizenship is restricted.

Conversely, being a full and equal citizen implies an ability to reasonably access all the rights and freedoms of a citizen, being subject to all the obligations and responsibilities of a citizen, being able to perform the same roles and functions as other citizens, being able to enter into the same social institutions as other citizens, and being able to participate full and equally in the society of which you are part.

CONCLUSION

All the strands of the above weave together to form a strong basis for the argument for access to civil-legal marriage by same-sex couples.

New Zealand has a well-founded strong commitment to human rights standards domestically and in international law. The very nature of civil and political rights means that minority groups rely on the ability of the majority to recognise fairness and equality and insist on proper treatment for minority groups. Where majoritarian rule fails to recognise fairness and equality and the rights of minority groups are not acknowledged or recognised, human rights standards should be invoked as a check on that majoritarian rule.

We are provided with the opportunity to strengthen the place of the individual within society, and to work towards an acceptance of diversity and a strengthening of society through acceptance of new characteristics and new ideals. We have the appropriate climate for challenges to take place through reasoned discussion facilitated by our human rights legislation.

In my involvement in the same-sex marriage issue, however, I have perceived that there is still a degree of suspicion towards human rights from politicians and the general public. Even though New Zealand has legislated its own domestic human rights laws,⁷⁴ and has signed and ratified international human rights treaties,⁷⁵ and has signed the Optional Protocols to various international treaties inviting United Nations scrutiny of Government actions,⁷⁶ there is still a lack of understanding of the status of these, and how they should be applied.

An adherence to international human rights standards is seen as undermining the autonomy of the nation-state. An adherence to domestic human rights standards is seen as undermining the autonomy of the Government. These factors can be threatening and lead to claims that adherence to human rights standards serves to undermine the stability of society as we know it. For example, in the same-sex marriage context,

⁷⁴ Such as the Human Rights Act 1993, and the New Zealand Bill of Rights Act 1990.

⁷⁵ Especially, for example, the International Covenant on Civil and Political Rights.

⁷⁶ For example, the Optional Protocol to the International Covenant on Civil and Political Rights (signed by New Zealand on 26 May 1989 and entered into force for New Zealand on 26 August 1989), and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women. It is the Optional Protocols that enable citizens of a signatory country to communicate a complaint, with regard to a breach of a Covenant protection, to the relevant United Nations judicial committee.

there is the expressed fear that same-sex marriage will undermine marriage as “we” know it, and consequently will undermine the nature of the family, and ultimately will cause the breakdown of society at large.

What is needed is a greater understanding of the realities of human rights laws and a commitment to human rights legislation coupled with the courage to step beyond the fundamentalist views about society and family. This will assist in overcoming the traditional safety-net of marriage “as it was”, and to move on to acceptance of diversity within our social institutions and ultimately the acceptance of same-sex relationships as valid social institutions worthy of full and equal social and legal recognition.

This thesis is entitled “Same-Sex Couples and Marriage: A Matter of Human Rights”, and it is human rights law and practice that forms the fundamental principle on which the thesis is founded. To deny me access to my human rights, is to deny me the opportunity to participate fully in the society of which I am supposedly a member. Conversely, granting me access to my rights grants me my citizenship, and my citizenship enables me to participate in society as a complete person rather than merely to the extent permitted by those around me.

While there may be different levels of rights, namely, inalienable rights (for example, the right to life), and fundamental rights (for example, the right to marry), rights are not given or removed at the whim of society. Rights belong to the citizen and cannot be conferred or denied by Government or Parliament. As Sovereign, Parliament can deny access to rights by the passing and implementation of restrictive legislation and practices. Conversely, by understanding the true nature of rights, and acting congruently with that understanding, Parliament will demonstrate a respect for citizenship.

The application of human rights standards is a balancing act.

First, it is necessary to balance rights so that no one person is in receipt of rights which impinge unreasonably on the rights of others.

Second, there is the balance between the acceptance of rights and the acceptance of responsibilities. In simple terms this can be illustrated by the obligation of paying taxes for the right of access to Government-funded services.⁷⁷

Third, there is a balance between the granting of rights and the restricting of those rights by applying “such reasonable limits prescribed by law as can be justified in a free and democratic society”.⁷⁸

Outside of these restrictions, there should be no further constraints. There should certainly be no “blanket” constraints based on individual characteristics such as race or ethnic origin, or sexuality. That is, save for the mutuality and interaction of the rights of one person with the rights of another, human rights are unconditional.

There have been, and still are, very clear examples in New Zealand of gays and lesbians being treated differently on the basis of their sexuality. This, when combined with different treatment based on marital status, marriage being a social institution which has been refused to gays and lesbians by virtue of the application of the law in New Zealand, denies to gays and lesbians many aspects of citizenship. This point is reflected in the statement of Justice Thomas in the Quilter same-sex marriage case, when he stated that:⁷⁹

... gays and lesbians are denied ... the rights and privileges, including the manifold legal consequences which marriage conveys. In a real sense, gays and lesbians are effectively excluded from full membership of society.

At least theoretically, the notion of citizenship is inextricably linked with the notion of human rights. Human rights legislation, and the application of that legislation, is about the interaction of individual persons one with another, and the interaction of a person with his or her Government. Human rights laws are about acceptance within society of a diversity of persons with a diversity of characteristics, and are designed first and foremost to protect the interests of minority groups against prejudices,

⁷⁷ Used as a general concept only in this context to illustrate this particular point. With the “roll-back” of the State, this notion could lead to a general discussion in itself.

⁷⁸ New Zealand Bill of Rights Act 1990 s.5.

⁷⁹ Quilter v Attorney-General [1998] 1 NZLR 523: 537.

and the discriminatory behaviours which stem from those prejudices. In particular, human rights legislation is about enabling persons who are members of any group which experiences discrimination to rise above that discrimination and function fully within society at large.

To the extent that gays and lesbians are being denied certain rights and privileges, and to the extent that gays and lesbians are being excluded from full membership of society, they are being denied their citizenship and being denied their dignity.

Chapter 5

COMMITMENT AND COURAGE

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INTRODUCTION

I am convinced that it is of very little consequence just what our human rights laws say if we are not, as a society, committed to those laws and the policies and standards they encapsulate and, if we are not, as a society, committed to having the courage to stand up for adherence to those laws and standards.

For me, these twin concepts reflect, very closely, the concepts outlined:

- in Chapter 3 with regard to:
 - marriage as a fundamental and meaningful social institution;
 - the failure of incrementalism with regard to civil and political rights imperatives;
 - the failure of tradition as a justification for different, less-favourable treatment; and
 - the potential for the positive over-arching effect of the notion of dignity;
- and in Chapter 4 with regard to:
 - full and equal participation as a citizen within the society in which one lives;
 - respect and acceptance as compared with (opposed to) tolerance; and
 - care and concern of the State as a practical demonstration of the dignity of the person.

The extent to which the State and the citizens of that State are willing to commit to and uphold laws, policies and practices that protect its more vulnerable citizens, is fully reflective of the degree to which the State has respect for the dignity of its citizens

In some ways, this section is perhaps is one of the harder sections of this thesis to write. It is not necessarily purely concrete, but is interpretive of events and practices that I have witnessed and towards which I have developed considered views. These views are essentially responses to questions such as:

- What might be the best way to protect minorities against majoritarian prejudice?
- What might be appropriate to ensure that there are reasonable checks and balances against parliamentary excesses?
- What might be appropriate with regard to strengthening the role and effect of human rights laws?
- What might be the most appropriate way of ensuring respect for the civil-legal rules within a secular state?
- based in principles such as – moral and ethical imperatives – somewhat

Much of my thinking is referenced to concrete examples and the viewpoints of others. Conversely, some of the section is a little more philosophical and perhaps jurisprudential in nature.

There are two main areas in which there is a great deal of work to be done in order for same-sex couples to gain access to legal marriage in New Zealand:

- On the one hand, there are arguably some shortcomings in relation to:
 - the status of, and the procedures relating to, our human rights laws; and
 - the substance of some of the laws relating to couples (and particularly those that relate to, or fail to relate to, same-sex couples).
- On the other hand, however, there is also much room for improvement in the way, and the extent to which, we utilise the options that are available to us already.

The shortcomings related to the status of, and the procedures relating to, our human rights laws are exemplified by the fact that, for example, while the Human Rights Act Amendment Act 2001 made provision for Declarations of Inconsistency, human rights legislation in New Zealand retains the status of ordinary law. This means that a Declaration of Inconsistency can be made by an independent judicial body,¹ but neither the Government, nor Parliament as a whole, is obliged to amend the offending legislation to remedy the inconsistency that has been declared.

The shortcomings related to the substance of some of the laws relating to couples are exemplified by that fact that, even though the temporary exemption for Government from the Human Rights Act 1993 expired some 15 months ago, Government has still not addressed all compliance issues. Even where some statutes have been amended, inconsistencies remain within statutes. In fact, Government is technically in breach of the human rights standards imposed by Parliament in 1993.

In short, there is still much room, at the systemic level, for improvement in relation to both the legislation and the procedures relating to the recognition, protection and promotion of human rights standards in New Zealand.

With regard to improvement in the way, and the extent to which, we utilise the options that are available to us already, it is important that we become more proactive, raising issues that we believe need to be raised. There has always been a core group of advocates, activists and lobbyists devoting a great deal of energy and time, but gay and lesbian communities generally tend to wait until an issue is on the agenda, and then react as they see appropriate at the time.

This chapter will consider the two fundamental principles of commitment and courage in the context of a range of practical considerations designed for their further enhancement.

¹ The Human Rights Act 1993 s.92J(2) (by virtue of the Human Rights Amendment Act 2001) provides that a Declaration of Inconsistency can be made by the Human Rights Review Tribunal, or upon subsequent appeal.

COMMITMENT

Speaking at her swearing in ceremony as the new Governor-General in April 2001, the Hon Dame Silvia Cartwright, said:²

Peace in the 21st Century extends beyond the absence of war ... it is a phenomenon that encompasses economic development and social justice ... it means democracy, diversity and dignity, respect for human rights and the rule of law. ... With the nations of the world we should commit to helping construct a new vision of peace, one based on universal values of respect for life liberty, justice, solidarity, tolerance, human rights and equality between men and women.

In the lead up to the passing of the Human Rights Act 1993, there was a great deal of work done by a great many people to ensure that the legislation passed in the form that it did. Not the least of these was Hon Katherine O'Regan, whose Supplementary Order Paper resulted in the inclusion in the Human Rights Act 1993 of prohibitions against discrimination on the grounds of sexual orientation and "the presence in the body of organisms capable of causing illness".³ There was also much debate at that time about whether or not the Armed Forces and the New Zealand Police should be subject to a permanent exemption from the prohibitions against discrimination – in the end analysis, they were not.

In a manner similar to the days leading up to the passing of the Homosexual Law Reform Act 1986, there was much personal and emotional energy expended. The result was that by 1993, New Zealand had domestic human rights legislation which included "sexual orientation" as an express ground of prohibited discrimination.

The value of human rights legislation does not lie merely in words on the pages of the statute books. Nor does the value of human rights legislation lie merely in words spoken by the Governor-General in her swearing-in ceremony. Nor does it lie merely in words outlining the promises of politicians, recorded in Hansard at the time of the Parliamentary debates.

² The Honourable Dame Silvia Cartwright PCNZM, DBE, Governor-General of New Zealand at her Swearing-In Ceremony, Parliament House, Wellington, New Zealand Government Press Release (4 April 2001).

³ Human Rights Act 1993 s.21(1)(m) and s.21(1)(h)(vii) respectively.

The value of human rights legislation lies in our commitment as a society to putting those words into action.

This is where I think New Zealand has fallen down with regard to domestic human rights issues. New Zealand has sent troops to Bosnia-Herzegovina as peace-keepers with the United Nations. We sent troops to East Timor as peace-keepers with the United Nations. We committed troops to Afghanistan and Iraq. We spoke out against human rights violations in overseas jurisdictions – including our renunciation of apartheid in South Africa and, more recently, the actions in Zimbabwe resulting in the loss of land rights to white farmers to the benefit of black citizens.

But back home we witnessed the lack of progress in relation to the “Consistency 2000” Project and the “Compliance 2001” Programme.⁴ We witnessed the continuing placement of children and young persons in adult prisons justified by excuses about a lack of facilities – the reservation on Article 23(1) of the United Nations Convention on the Rights of the Child was put in place in 1989 and has not yet been removed.

The value of our human rights legislation lies in a commitment to those standards regardless of the visibility to international communities, or the visibility to domestic communities. When we agree to put human rights legislation in place, we agree to accept the obligation to commit to those standards, not selectively, but at all times.

Executive Government

During the main part of the 1990s, the Government of the time displayed a lack of commitment to human rights issues generally, and to the rights

⁴ The “Consistency 2000” Project stemmed from the requirement of the Human Rights Act 1993 that all New Zealand legislation be assessed for compliance against the discrimination protections contained in the Act. See further discussion on this and the “Compliance 2001” programme in Chapter 7.

of gay and lesbian couples in particular.⁵ This was highlighted clearly by (amongst others):

- the Government's attempts to bring the "Consistency 2000" Project to a premature end;
- the refusal to include same-sex couples in the proposed de facto property legislation (see discussion elsewhere in this chapter);
- comments of the Prime Minister of the time, Rt Hon Jenny Shipley, when she attended the HERO Parade in Auckland in 1998 and talked of "celebrating diversity", and then returned to Wellington and announced, the very next day, that same-sex couples would not be included in the Government's proposed amendments to relationship property legislation; and
- similarly, comments of the Minister of Justice of the time, Rt Hon Doug Graham, when he stated that: "Diversity is a key defining characteristic of families in the nineteen-nineties",⁶ and then went on to announce that property law protections would not be extended to couples living in same-sex relationships.

Mary Robinson, former United Nations Commissioner of Human Rights said, in her farewell speech:⁷

Most governments today will at least acknowledge that human rights have a role to play. Unfortunately that does not necessarily mean that they will observe human rights standards. You will often still hear governments arguing that they must place other factors first. The difference is that today those sorts of claims go against the tide of opinion ... It is time for those who believe in human rights to keep their nerve. Human rights are not expendable, whatever the circumstances.

A Government that is committed to human rights standards:

- will not compromise those standards;
- will not self-censor its human rights goals, but rather will put forward its ideals for debate and, hopefully, enactment;

⁵ See, again, discussion in Chapter 7.

⁶ Graham, Rt Hon Doug, "Minister of Justice's Opening Speech", Family Property Symposium, Victoria University of Wellington (1 November 1994), in [1995] 25 VUWLR 3: 3.

- will commit resources (time, personnel, funding) to ensure that the best possible human rights results are achieved;
- will advocate for laws which are compliant with human rights standards, rather than those which are easily achievable; and
- will ensure that its members look beyond personal gain in order to support a matter of human rights principle.

Unfortunately, there are too many indicators suggesting that our Governments are not as committed to human rights standards as they might like us to believe. Ultimately, adherence to human rights principles is diluted by the competing interests of, for example, fiscal “responsibility”, ensuring majority support, and political pragmatism.

Development of legislation

The development of human rights compliant policy and legislation currently appears to fall down in two particular ways:

1. Officials developing the policies are not necessarily familiar with the specifics of human rights legislation or the requirements of human rights standards.
2. Even where officials identify human rights inconsistencies, Government still can (and does) choose to pass policy into law.

Policy development

It is a Cabinet requirement that, when policy proposals are being developed, consideration must be given to their consistency with the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.⁸

⁷ Robinson, Mary, Former United Nations High Commissioner for Human Rights, Farewell Speech in Geneva (10 September 2002).

⁸ Department of the Prime Minister and Cabinet, “Cabinet and Cabinet Committee Processes: Step-by-Step Guide”: para.3.41:

As a result of the considerations, any Cabinet Paper should include a section which:⁹

- a) states the nature of any potential inconsistencies identified (or states that there are none);
- b) notes the steps to be taken to address the issues; or
- c) includes information on any justifications for the policy infringing a right or freedom.

The upshot of this is that all Cabinet papers being prepared by Government departments should include a paragraph which outlines “human rights implications”. Until 31 December 2002, this meant that any implications arising from Government’s commitments under the New Zealand Bill of Rights Act 1990, and the applicable provisions of the Human Rights Act 1993, were to be canvassed in this section. Since that date, it has meant that all human rights implications (that is, implications arising under the Human Rights Act in general, as well as the Bill of Rights Act) should be canvassed.

Scrutiny

Where legislative policy is being developed and there may be human rights implications, it is the responsibility of the Public Law Group within the Ministry of Justice, or the Crown Law Office, to “vet” the proposals.¹⁰ The result of their examination of the proposal is a report to the Attorney-General on the status of that proposal – that is, whether it breaches, or potentially breaches, New Zealand human rights laws.

If the vetting finds the proposed legislation to be inconsistent with human rights laws, at the time of the introduction to Parliament of the Bill resulting from the proposal, the Attorney-General is required, under the New Zealand Bill of Rights Act 1990 s.7, to table a report outlining in

<http://www.dpmc.govt.nz/cabinet/index.htm> (Retrieved: 3 August 2009).

⁹ Department of the Prime Minister and Cabinet, “Cabinet and Cabinet Committee Processes: Step-by-Step Guide”: para.3.43:
<http://www.dpmc.govt.nz/cabinet/index.htm> (Retrieved: 3 August 2009).

what way the legislation is, or may be, inconsistent with human rights standards, and how this inconsistency has been dealt with, or how it can be justified.

The legislation then follows its usual path through the legislative process and, ultimately, Parliament in Committee votes on whether or not to pass the legislation.

There are two key concerns with regard to this process.

First, it is possible for a Section 7 Report to state that a Bill contains provisions which are *prima facie* discriminatory, that the *prima facie* discrimination is not justifiable, but for the Bill to be passed notwithstanding.¹¹ Section 4 of the New Zealand Bill of Rights Act 1990 provides that no court shall decline to give effect to any statute solely on the basis that it is inconsistent with the Bill of Rights Act.¹² That is, no court is able to strike down inconsistent legislation.¹³ This provision is not intended to empower Parliament to make legislation that is unjustifiably in breach of New Zealand's domestic human rights standards. As Paul Rishworth states:¹⁴

It is incorrect to regard s 4 of the Bill of Rights as an affirmation that Parliament may legislate inconsistently with rights and freedoms, still less an empowerment to do so.

In my experience, Members of Parliament tend to 'forget' their obligations under our human rights legislation when it suits them to do so by either

¹⁰ The Ministry of Justice performs this function unless the legislation is being developed by, and is to be administered by, the Ministry in which case the vetting is undertaken by the Crown Law Office.

¹¹ See, for example, the Section 7 Report on the Social Security (Long-term Residential Care) Amendment Bill 2003: <http://www.justice.govt.nz/bill-of-rights/bill-list-2003/s-bill/section7-social-sec.pdf>: (Retrieved: 7 August 2009).

¹² New Zealand Bill of Rights Act 1990 s.4:
Section 4 - Other enactments not affected:
No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), —
(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) decline to apply any provision of the enactment —
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

¹³ Although, the Human Rights Review Tribunal or the courts can make declarations of inconsistency as discussed in the following section.

¹⁴ Rishworth, Paul, "Human Rights", in [2003] N.Z.L.Rev. 261: 264.

failing to consider these human rights obligations at all, or by applying them incorrectly and employing questionable justifications.¹⁵

Second, is that it has been a matter of practice that the Attorney-General also holds Ministerial portfolios. As a Minister, this person is responsible for overseeing the development of legislative policy. The same person, in his or her capacity as the Attorney-General, is then required to provide advice to Parliament on his or her own legislation.

Currently, the Ministry of Justice website carries copies of the Ministry of Justice advice to the Attorney-General and, in some instances, copies of the Attorney-General's report to the House. This means that these documents are available for public scrutiny. However, this procedure has been recently initiated, and has no formal or binding status. Whether or not this practice is continued is a matter for the Attorney-General of the time on a case-by-case basis.

In the final analysis, while there may be a degree of transparency about the vetting process, the fact that proposed legislation may be inconsistent with human rights standards does not mean that it will not become law.

Declarations of Inconsistency

The Human Rights Act (since the amendment in 2001) now provides for the Human Rights Review Tribunal, or our courts, to make a Declaration of Inconsistency in relation to any legislation which an applicant can show is in breach of anti-discrimination provisions.

Any citizen may challenge the validity of any statute in relation to its compliance with New Zealand human rights legislation by making an application under the Human Rights Act 1993 s.92J.¹⁶ If successful, a declaration may be issued that the legislation is inconsistent with the provisions of our human rights laws.

The ability to seek and be granted a Declaration of Inconsistency appeared to be a step forward in terms of human rights compliance in

¹⁵ See the discussion on "Conscience Votes later in this chapter, and the discussions on "MPs and Decision-Making" and "MPs and One-Law-For-All" in the next chapter.

¹⁶ Inserted by the Human Rights Amendment Act 2001.

New Zealand. However, the reality is that, while legislation may be declared to be inconsistent with human rights laws, there is no compulsion on Parliament to remedy the inconsistency:¹⁷

A declaration under section 92J does not –

- (a) affect the validity, application, or enforcement of the enactment in respect of which it is given; or*
- (b) prevent the continuation of the act, omission, policy or activity that was the subject of the complaint.*

It does, however, require that:¹⁸

... the Minister responsible for the administration of the enactment must present to the House of Representatives –

- (a) a report bringing the declaration to the attention of the House of Representatives; and*
- (b) a report containing advice on the Government's response to the declaration.*

That is, the inclusion of an ability for the Court to declare a statute inconsistent with the Bill of Rights does not enable the Court to “strike down” legislation. At best, it provides the Court with an ability to convey to Parliament a message about the state of the law.

The “Compliance” Process

The history of the “Compliance 2001” process, in itself, encapsulates the lack of commitment of our Governments, and the impotence of our human rights compliance processes, to ensure the efficient and appropriate development of legislative policy.

Technically, by the time of the passing of the Relationships (Statutory References) Act 2005, Government (Parliament) had been in breach of our human rights legislation for in excess of two years. The compliance process (previously “Consistency 2000”) began when the Human Rights

¹⁷ New Zealand Human Rights Act 1993 s.92K(1).

¹⁸ New Zealand Human Rights Act 1993 s.92K(2).

Act 1993 came into effect on 1 February 1994 and was due for completion by 31 December 2001 (having already been delayed by the previous National-led Government by two years). By 31 December 2001, all New Zealand legislation should have been audited for compliance with the Human Rights Act, and amended to either make it compliant or provide it with a permanent exemption from compliance.

It is possible to take complaints to the Human Rights Commission under the Human Rights Act 1993 s.92J. It is also highly likely that, if an inconsistency were found, the Government response would be that the legislation is still under review. This does not respond to the fact that the due date for completion is well past, nor does it respond to the need for certainty and clarity in the law. What it does say is that these matters will be dealt with in a manner, and within a time frame, that Government see fit.

Summary

Thus, New Zealand's human rights laws maintain a façade of respectability. The reality, however, is that human rights compliance within New Zealand legislation is subject to the commitment and support of individual MPs. Ultimately, the regime which purports to ensure consistency with human rights standards actually enables Government and Parliament to ignore advice to them that proposed legislation is inconsistent, and to decline to remedy any existing legislation which is declared to be inconsistent.

Lord Cooke of Thorndon has stated that:¹⁹

... the New Zealand Bill of Rights Act 1990 is regarded internationally as one of the weakest affirmations of human rights, in that sufficiently clear legislation passed by ordinary Acts of Parliament (and possibly very speedily in the absence of a second House) can override it. This is illustrated by the case on same-sex marriages, Quilter v Attorney-General, where the Court of Appeal were unanimous that the Marriage Act 1955 was so clear in restricting marriage to heterosexual unions that the anti-discrimination

¹⁹ Lord Cooke of Thorndon, "The Role Of The Judges", a paper presented at the "Building The Constitution" Conference, Wellington, New Zealand (7-8 April 2000): 67.

provisions of the Bill of Rights were overridden. Yet the Judges devoted many pages to individual discussion of whether that restriction amounted to discrimination on the ground of sexual orientation, contrary to the Bill of Rights ... There seems something incongruous however, in expecting the court to engage in an elaborate academic discussion which could not even end in a declaration of incompatibility, constitutionally provided for so that Parliament might be expected to take actions upon it.

The power of the Bill of Rights Act lies merely in its ability to insist on the consistent interpretation of legislation which is already consistent with the Bill of Rights Act. Even where legislation is considered to be inconsistent with our human rights laws, correction of that inconsistency is reliant upon the commitment of our lawmakers.

Strengthening the status and role of our human rights legislation

New Zealand's constitution is neither entrenched nor supreme. That is, any component of our multi-document constitution is vulnerable to change by a simple majority vote in Parliament. This fact, and the fact that Parliament retains the ability to create law which is inconsistent with our human rights standards, and the fact that the courts remain unable to strike down such legislation, all potentially give cause for concern.

The Human Rights Act purports to “provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights”.²⁰ The Bill of Rights Act purports to “affirm, protect, and promote human rights and fundamental freedoms in New Zealand” and to “affirm New Zealand's commitment to the International Covenant on Civil and Political Rights”.²¹

The New Zealand Bill of Rights Act was initially proposed for several reasons:²²

- New Zealand does not have a written constitution. There is, therefore, no single document to which New Zealanders can turn to seek protection of fundamental civil rights. The Bill of Rights was

²⁰ Human Rights Act 1993 Title.

²¹ New Zealand Bill of Rights Act 1990 Title.

designed to cover the most fundamental rights – generally along the lines of those rights contained within the International Covenant on Civil and Political Rights.

- New Zealand also lacks one of a number of constitutional safeguards present in other countries. New Zealand operates a uni-cameral parliamentary system – one House of Parliament. Many countries operate a bi-cameral system with an Upper House and Lower House in which both Houses are involved in the passing of legislation, although the Upper House will generally “revise” legislation passed by the Lower House and affirm or reject it.

Entrenchment

When the New Zealand Bill of Rights Bill was first being considered, it was proposed that an entrenchment provision should be included. Entrenchment would have protected the Bill of Rights by placing it beyond repeal or amendment by a simple majority in Parliament. An entrenched statute would only be able to be amended with the support of, for example, 75 percent or more of the members of Parliament or a majority in a referendum of electors.²³

Chris Lawrence, former Proceedings Commissioner with the Human Rights Commission, in an interview about his time as Commissioner, said:²⁴

Our human rights laws are in the Bill of Rights Act and the Human Rights Act. Both of them are just ordinary statutes that could be repealed at any point by a simple majority of parliament. And, what's worse, both can be overridden by mere regulation (that is, a form of legislation made by

²² See: Minister of Justice, “A Bill Of Rights For New Zealand: A White Paper”, presented to the House of Representatives by Leave by the Hon Geoffrey Palmer Minister of Justice, Wellington (1985).

²³ See: Minister of Justice, “A Bill Of Rights For New Zealand: A White Paper”, presented to the House of Representatives by Leave by the Hon Geoffrey Palmer Minister of Justice, Wellington (1985).

²⁴ Lawrence, Chris, former Proceedings Commissioner with the Human Rights Commission, “Safeguards Needed To Protect Human Rights Gains”, *express* (28 August – 10 September 2002): 3 and 8. Note that, with the passing of the Human Rights Amendment Act 2001, the position of Proceedings Commissioner was transformed into the position of Director of Human Rights Proceedings.

executive government not by parliament). ... [O]ur human rights laws are not constitutionally entrenched and are actually quite fragile. ... There has been a great deal of improvement in recognition of same-sex relationships. But none of these gains are set in concrete ... [and] remain hostage to an uncertain future.

The key effect of entrenching our human rights legislation would be to provide a protection for our human rights legislation into the future. Such a protection cannot be guaranteed currently because our human rights laws can be repealed or amended by a simple majority in the House. Entrenchment would therefore bring greater certainty and security for the future of human rights protections in New Zealand law.

Supreme Law

A further way of strengthening our human rights legislation would be to give it the status of supreme law. This would ensure that successive Governments would be required to follow the dictates of that legislation, or their acts could be “struck down” by the Courts.

When this was first mooted in relation to the New Zealand Bill of Rights, there was a good deal of concern expressed at the notion of the Court being given the power to strike down legislation.

There was a hesitancy about giving too much power to the judges, as unelected officials, instead of politicians, as elected representatives:²⁵

... a written constitution carries with it costs, many of which are hidden from superficial view. The main one is the high degree of power such written constitutions take from elected legislators and give to unelected judges. Political choices, social policy-making decisions, get transmogrified into legal issues.

In submissions to the Ministry of Justice on the “Re-evaluation of Human Rights Protections in New Zealand”, responses on the issue of supremacy of human rights laws appeared to be reluctant to unreservedly support the idea. In the main, they suggested that while it

may be appropriate to give human rights law supreme status at some stage, there should be much more public debate on the issue, especially bearing in mind the wider-ranging constitutional issues such as the place of the Treaty of Waitangi. This appeared to be the same view that had been expressed some 15 years earlier in the original debate around the proposal for a Bill of Rights. Submissions seemed to suggest that the expectation that the existence of the Bill of Rights would promote discussion about it did not eventuate. Very little debate was prompted, and the public generally seemed fairly unaware of the role, or to a large extent even the existence of, the Bill of Rights.^{26 27}

The issue of the future of the Bill of Rights and questions of primacy have hardly yet been canvassed in the public arena.

If we are to move down the path of BORA entrenchment, the most appropriate first step would be for Government to signal that intent and debate it in the run up to the next election. The whole question including the constitutional position of the Treaty could then be properly considered in the term of the new Parliament.

At the same time, other submissions advocated a mid-level alternative along the lines of the Canadian Charter of Rights and Freedoms, and the United Kingdom Human Rights Act. The suggestion was that, at least until there has been greater public debate, there should be an amendment to empower the courts to declare legislation to be inconsistent with non-discrimination provisions:²⁸

[W]e should be having an ongoing constitutional debate about a ‘superior law’ Bill of Rights. However, as an interim measure, ACCL would support the minority view of Paul Hunt that Section 4 of the Bill of Rights should be amended to create a procedure by which the Courts may declare that a statute is incompatible with the Bill of Rights, while leaving Parliament to decide what, if any, action to take in respect of the statute concerned.

²⁵ Allen, James, “No To A Written Constitution”, paper presented to the “Building the Constitution Conference”, Legislative Council Chamber, Parliament Buildings, Wellington (7-8 April 2000).

²⁶ Unnamed submitter in: Ministry of Justice, “Re-Evaluation Of Human Rights Protections In New Zealand”, Ministry of Justice, Wellington (May 2001): 14.

²⁷ New Zealand AIDS Foundation in: Ministry of Justice, “Re-Evaluation Of Human Rights Protections In New Zealand”, Ministry of Justice, Wellington (May 2001): 14.

Summary

The mere fact that written constitutions and entrenchment seem to generally go hand-in-hand, does not stop us from entrenching our human rights legislation separately, as supreme legislation in its own right. The key issue is not about process, but whether or not we take our human rights protections seriously enough to feel comfortable about entrenching them and giving them the status of supreme legislation.

The proponents and initiators of the New Zealand Bill of Rights Act 1990 hoped that its passing into law (and, presumably reinforced with the passing of the Human Rights Act 1993), and its presence in the New Zealand legal climate, would assist in the process of educating the people of New Zealand about the nature of human rights and human rights legislation. It was further hoped that this would reduce the fear factor in relation to any perceived shift in power from the legislature to the judiciary.²⁹

The issue is not whether or not human rights should be protected. New Zealand society has already decided that, in New Zealand, protection of human rights is important. In response, the New Zealand Parliament enacted two pieces of legislation designed to regulate behaviours towards protected groups of persons in the public sector and in the private sector.³⁰ Subsequently, it is wholly appropriate that the standards that were put in place in that legislation should be upheld by the judges – this is their role, to interpret legislation where necessary (clarify the meaning of specific human rights provisions), and / or arbitrate on issues relating to the rights for which provision has been made (the protection of rights against undue limitation, or the balancing of competing rights).

An interim measure is in place since the passing of the Human Rights Amendment Act 2001. As outlined above, the Human Rights Review Tribunal and courts of New Zealand now have the power to make a

²⁸ Auckland Council for Civil Liberties in: Ministry of Justice, “Re-Evaluation Of Human Rights Protections In New Zealand, Ministry Of Justice, Wellington (May 2001): 14.

²⁹ See: Minister of Justice, “A Bill Of Rights For New Zealand: A White Paper”, presented to the House of Representatives by Leave by the Hon Geoffrey Palmer Minister of Justice, Wellington (1985).

³⁰ New Zealand Bill of Rights Act 1990 and Human Rights Act 1993 respectively.

declaration of inconsistency where a legislative provision is held to be inconsistent with our human rights standards.

However, if we are truly committed to maintaining fundamental human rights standards in New Zealand, it would now seem to be an appropriate time for further consideration to be given to the possibility of providing our human rights legislation with the status of supreme law, possibly within the framework of a single-document, entrenched New Zealand Constitution.

Legislature

Conscience Votes

It has become accepted practice for some issues before the House of Representatives to become issues of “conscience” in relation to which MPs are able to exercise a “conscience” vote or “free” vote (hereinafter, “free” vote).

Prior to the advent of the Mixed Member Proportional (MMP) system of Parliamentary voting, decisions relating to whether or not an issue should be the subject of a free vote were a matter of convention. There were no prescribed reasons for taking a free vote on any particular issue. Historically, however, Parliamentary Parties have tended to permit its MPs to exercise a free vote where Party policy does not apply, for contentious issues, and for issues affecting the sanctity of life.³¹

I would question the need for free votes to be taken around issues relating to sexual orientation. A free vote is designed to permit members of a particular party to refrain from adhering to the party line on a particular issue. A free vote is not a licence to MPs to vote in any manner they please.

MPs, as with all persons in New Zealand, are required to act lawfully. A free vote does not release MPs from this requirement. Therefore, when they are exercising their vote, they are required, by law, to take human

³¹ Free votes have been exercised in New Zealand in relation to: abortion (1970s), homosexuality (1986), casino control (1987, 1990, 2000), corporal punishment in schools (1990), homosexual relationships and property (2000, 2001), age for being on licensed premises (2001), appointment of members to the Abortion Supervisory Committee (2001), shop trading hours (2002), prostitution law reform (2003).

rights legislation into account and must not disregard it.³² Any decision on their part to limit the rights to be contained within new legislation must therefore be “demonstrably justified”.

MPs may also see a free vote as an opportunity to reflect the views of those they represent. While, in general terms, voting in the House in accordance with the (perceived) wishes of the electors may be an appropriate goal, the same principle applies as above. That is, MPs are required to act lawfully, taking human rights legislation into account, and not to vote arbitrarily on the basis that a particular vote reflects the views of the persons they represent.

The practical result of free votes as they are exercised currently means that:

- law-makers are enabled to exercise their own free choice in a manner that, if the legislation is passed, will deny others choice in their lives – in most instances, a conscience vote provides freedom of choice only to that Parliamentarian, not to their constituents or any other member of society;³³
- religious views are often supported because most matters on which a conscience vote has been allowed involve issues on which one or more churches have a rigid position;³⁴
- MPs are no longer accountable to their Party – this may be of particular concern within the MMP system where List MPs are in Parliament by virtue of the Party Vote;³⁵
- MPs are no longer accountable to electing voters – subject to the qualification above in relation to acting in accordance with the law;³⁶

³² The Title to the New Zealand Bill of Rights Act states that it applies to acts done by the legislative, executive, or judicial branches of Government.

³³ Allum, Margaret, “Whose Conscience Counts?”, in *Green Weekly*: <http://www.greenleft.org.au/back/2000/417/417p12.htm>: (Retrieved: 17 January 2004).

³⁴ Allum, Margaret, “Whose Conscience Counts?”, in *Green Weekly*: <http://www.greenleft.org.au/back/2000/417/417p12.htm>: (Retrieved: 17 January 2004).

³⁵ Allum, Margaret, “Whose Conscience Counts?”, in *Green Weekly*: <http://www.greenleft.org.au/back/2000/417/417p12.htm>: (Retrieved: 17 January 2004).

³⁶ Allum, Margaret, “Whose Conscience Counts?”, in *Green Weekly*:

- the views of parliamentary representatives are given more weight than those of the persons who will be affected by the politicians' decisions.³⁷

Ideally, the granting of a conscience vote should signal a need for Members to be even more diligent about becoming well-informed about the issues before them so that they can make a robust decision:³⁸

Conscience votes require a great deal of concentration and effort on the part of MPs, and it is much more intricate than the usual Party votes that are held.

In reality, conscience votes are seen by (some) MPs as releasing them from the need to undertake an information-based, intellectual consideration of the issues. I was in the Public Gallery of the House of Representatives when a free vote was taken on the Property (Relationships) Act 2001. On that occasion, I witnessed a senior Member enter the Chamber of the House upon the ringing of the bells, ask his colleagues what was the question that was being voted upon, and then say: "Oh, never mind, I'm voting against it anyway" – which he did.

It also seems somewhat spurious to grant a free vote when there is a tacit expectation that members will vote along the lines of Party political principle. The Leader of United Future New Zealand stated:³⁹

Where ideological extremism gets in the way of common sense, we have not hesitated to oppose ... issues like ... the Care of Children Bill". He further stated: "On moral issues, which are treated as conscience votes rather than party votes, United Future has also stuck to its principles. All our MPs voted against the Prostitution Bill at every stage, and we are also strongly opposed to the Death with Dignity Bill.

In spite of our human rights laws, the purpose of which is to protect New Zealanders from prejudice, our system permits members of Parliament to vote on our rights in accordance with their personal views.

<http://www.greenleft.org.au/back/2000/417/417p12.htm>: (Retrieved: 17 January 2004).

³⁷ Corcoran, Trish, "Politicians Attack The Right To Choose" in *Green Weekly*: <http://www.greenleft.org.au/back/1996/234/234p9b.htm>: (Retrieved: 17 January 2004).

³⁸ "Wellington Watch: A Weekly Bulletin Of Parliamentary And Political Information", Issue 2001/8, Chen Palmer and Partners (16 March 2001).

³⁹ Dunne, Peter, "Why Work With Labour And Not National", United Future New Zealand, Press Release (18 February 2004).

I consider that there is no justification for permitting free votes on relation to any issue generally, or in relation to issues affecting gays and lesbians specifically. If free votes are to remain part of our Parliamentary procedures it is clear that there needs to be greater clarification around the purpose of such votes, and the manner in which they can be exercised.

Populist Decision-Making

In relation to human rights issues, it is not appropriate for Members to rely on majority public support before they make a decision.

The fundamental purpose of human rights legislation is to provide protection to minorities from the prejudices of the majority. To then go out and seek approval from that very majority on whether or how those protections should be applied is not only illogical, but also potentially dangerous for the well-being and welfare of those minorities.

It must be remembered that the issue of what human rights standards would be applicable in New Zealand were debated, and decided upon, in the years leading up to 1993. That is, the anti-discrimination provisions were put in place by Parliamentary vote after concerted lobbying by interest groups – including opponents – and it is not now reasonable to expect members of the supposedly protected minority groups to re-litigate those same protections.

As a result of the 1993 changes to the Human Rights Act, a range of new grounds, including sexual orientation without exemptions for the Armed Forces or the NZ Police, became part of the Act. For this very reason, our domestic human rights legislation not only gives Government a mandate to protect our minority rights from majoritarian prejudice, but also places on them an obligation to do so. It is also on this very basis that it is inappropriate for the Government to seek the views of New Zealanders at large on what level or levels of protection against discrimination should be offered to any minority group.

However, in August 1999, the Ministry of Justice published a consultation document on the legal recognition of same-sex couples.⁴⁰ In this instance, concerns about public consultation on human rights matters were magnified. Not only did the paper attract disproportionate numbers of submissions from conservative groups, but also it attracted submissions from two key legal (independent Governmental) institutions as part of a public submissions process.⁴¹

Political Pragmatism

As discussed above, MPs are subject to the law in the same way as any other person or entity in New Zealand. Political pragmatism should only feature in the preparation of legislative policy, therefore, to the extent that that political pragmatism does not give rise to a breach of our human rights standards.

In a statement that fails to display a commitment to principled human rights standards, Peter Dunne wrote in a press release:⁴²

... politics are more about the achievable than the desirable, and that pragmatic compromise leads to more progress than rigid ideological extremism.

This approach to human rights issues leads us to the incremental approach commonly used by legislatures which suggests that human

⁴⁰ See discussion in Chapter 7 on this document “Same-Sex Couples and the Law”, which invited public comment by 30 April 2000. The document is available at: http://www.justice.govt.nz/pubs/reports/1999/same_sex/index.html. (Retrieved: 31 August 1999).

A prior draft of the document stated that (former National) Government policy did not allow for same-sex marriage nor the adoption of children by same-sex couples. Cf. Law Commission Report 65, “Adoption and Its Alternatives: A Different Approach And A New Framework” (September 2000): paras.350-364: “We recommend that the terminology of a new Act make it clear that de facto (including same-sex couples) may adopt”, http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_72_144_R65.pdf, (Retrieved: 3 November 2000).

⁴¹ See further discussion in this Chapter in relation to Constitutional Watchdogs.

⁴² Dunne, Peter, “Why Work With Labour And Not National”, United Future New Zealand, Press Release (18 February 2004). Dunne made this comment in the context of negotiating a Coalition-type agreement after a New Zealand general election. The implication in this quote is that it is preferable to compromise on

rights equality is a process rather than a destination. This approach defies logic. To suggest that equality can be achieved incrementally is to suggest that equality can be enhanced in graduated steps. This in turn suggests that we can be equal in part, with that part being increased in gradation over time. The concept of partial equality is oxymoronic – it is not possible to be partially equal.

In lobbying terms, there is also a difficulty with the concept of setting a (practical) goal which falls short of the ideal. For example, if the goal is to travel from Wellington to Auckland, it is of no use planning to go half way, without plans to complete the journey. In the same way, to reach a political compromise before putting the issue on the table suggests defeat has been accepted before the battle has been begun.

Thinking back to the homosexual law reforms of 1986, it is notable that on at least two occasions previously there had been proposals for decriminalisation of homosexual behaviour but with an unequal (older) age of consent. On both these occasions, the gay community rejected the proposals on the basis that the compromise was not acceptable.

Thinking back also to the passing of the Human Rights Act 1993, the same principle was applied. Initially, the amended grounds of prohibition against discrimination did not include sexual orientation, or the presence in the body of diseases of the blood. Even after a successful vote in the House for the inclusion of sexual orientation, the possibility of exemptions from this ground for the Armed Services and the New Zealand Police were considered. Eventually, the call for full equality without compromise won through.

Thus, if the goal is full and equal treatment under the law, this is what we should work towards. Only if we are unsuccessful should we consider a compromise. This compromise may be a fall-back position that we have had in mind during the battle for equality, but the compromised position should not be our goal.

On this point, it seems, we have a very unlikely ally. During the Third reading on the Civil Union Bill, as part of a misguided argument for a

principle and get into a power-sharing arrangement than to adhere to principle and get no result.

referendum on the issue, Rt Hon Winston Peters said:⁴³

The supporters of the Civil Union Bill argue that this is an equality issue, an equity issue, a fairness issue, and a one-law-for-all issue. The real question is whether that is correct, right and factual. For that to be right, correct, and factual the proponents of this bill know full well that it would have to have only one clause in it: a clause that gave homosexuals the same right as heterosexuals under the Marriage Act. ... Does this Bill do that? No, it does not. It does everything but that, that is why so many fundamental homosexuals do not want a bar of this bill. Why is it that Mr Barnett says that he supports it, yet condemns those very people to second-class citizenry? ... Fundamental homosexuals do not support this bill, and the proponents of this bill know that. But not having the courage of their convictions, they throw a sop to the homosexual community and say homosexuals can like it or lump it, ... What has happened to the courage of those members' convictions?

There should be no compromise on the part of a Minister on the basis that a particular action is more politically pragmatic – the Minister's role is to administer the laws of New Zealand relevant to his or her portfolio. There should be no compromise on the part of Members of the Legislature – their role is to advocate in the best interests of constituents, including the rights of minorities. Approaching policy issues on the basis of political pragmatism seriously and unreasonably limits the options available to those in the community who are lobbying for, and who are affected by, the changes being sought.

Separation of powers

In constitutional law classes, university law students are taught about the doctrine of the “separation of powers”. Essentially, they are taught that there are three arms to Government, namely the Judiciary, the Executive, and the Legislature. This doctrine, originally found in some ancient and medieval theories of government and developed over time,⁴⁴

⁴³ Rt Hon Winston Peters, Hansard: Parliamentary Debates, Third Reading of the Civil Union Bill (9 December 2004).

⁴⁴ Byrd, Robert, The Senate of the Roman Republic. U.S. Government Printing Office Senate Document 103-23 (1995):For example, the government of the Roman

is embodied in convention which dictates that the processes of government should involve the different elements in society – the monarchical, the aristocratic and the democratic.⁴⁵

The “separation of powers” in theory

The official, formal line is that these three arms of Government must operate separately so that each can provide checks and balances on the other, and thereby ensure the maintenance of accountability and impartiality.

The Judiciary

The Judiciary is independent of the policy- and law-makers. Judges make decisions based upon the interpretation of the laws that have been passed by the Legislature. The laws are a manifestation of the will of the Legislature and may only be amended by the will of the Legislature.⁴⁶

Where the Judiciary interprets legislation in a manner which the Executive deems to be inappropriate, the Executive may not direct the Judiciary to review its decision, but may initiate a change to the legislation to make it clearer. Similarly, the Judiciary must neither comment on the worth of a particular policy, nor suggest what policy should be incorporated into law. The only comment the Court may make in relation to policy is where it deems a particular law to be unlawful.

There is no direct role within our Courts either for Members of Parliament or for Members of the Executive.

Republic (about 500BC to 50BC) divided power into three independent branches: the Senate, the Assemblies, and the Magistratus.

⁴⁵ Walker, David M., Oxford Companion To Law, Oxford University Press, New York (1980): 1131.

⁴⁶ In New Zealand there is no ability for the Courts to strike down legislation. Under the Human Rights Act 1993 (subsequent to the Human Rights Amendment Act 2001, there is an ability for the Court to make a “declaration of inconsistency”, thereby declaring a particular piece of legislation inconsistent with the New Zealand Bill of Rights Act 1990, but it cannot change the meaning of that legislation, nor can it declare the legislation invalid (that is, cannot strike it down).

The Executive Government ("The Executive")

The Executive Government consists of Ministers and the organisations over which Ministers have authority – Government Ministries and Departments constituting the “public service”. There are two key roles for officials of the public service, namely:

- to assist with the development of policy by providing “full and frank” advice to Ministers and to alert Ministers to the possible consequences of following particular policies;⁴⁷ and
- to implement the legislation which subsequently results from the development of that policy to the best of its ability.

Ministers of the Crown carry the responsibility for the success or failure of the implementation of Government policies which have been incorporated into legislation.

There is no direct role in the administration of Government either for Members of Parliament or for members of the Judiciary.

The Legislature

The Legislature consists of the Head of State or her representative together with all Members of Parliament. It is the role of the legislature to translate policy into legislation. For this to happen, draft legislation moves from the Committee of the Whole House (the Legislature) and into a Select Committee for its consideration and possible revision, and then back to the Committee of the Whole House for its decision. The Legislature makes the laws, levies taxes and allows public money to be spent.

There is no direct role within the Legislature either for Members of the Executive (at least, not acting strictly in their role as Ministers) or for members of the Judiciary.

⁴⁷ “Full and frank” is alternatively described as advice that is “honest, impartial and comprehensive”.

Interrelationship of the Three Arms

The relationship amongst these three branches of Government is, in turn, governed by five constitutional principles:

- The Supremacy of Parliament – Parliament has the supreme power to make and unmake laws, which take precedence over common law. These laws are binding on the Judiciary, the Executive Government, and citizens – any of whom are obliged to obey the law and can be held to account, either directly or through agents, for any breach of the law.
- Ministerial Responsibility – Ministers are responsible to Parliament for the conduct of their departments.
- Responsibility of Chief Executives to Ministers – Chief Executives of Government departments are responsible to their Minister(s) for the efficient, effective and economical management of the activities of their department.
- Political Neutrality – Public servants must be impartial, not favouring any party political interest over another
- Professional independence – It is the concept of “full and frank” advice which particularly interests me in this context. Public servants give policy advice, but the final decision on policy is the prerogative of Ministers. For this reason, public servants must provide honest, impartial and comprehensive advice, and,⁴⁸ must not withhold any relevant information from Ministers, seek to obstruct or delay a decision, or attempt to undermine or improperly influence the Government’s policy.

The “separation of powers” in practice

It is acknowledged that, in practice, there is never any complete separation of the three arms of Government (for example, Parliament

⁴⁸ State Services Commission, “The Practice Of Government: How The Public Service Plays Its Part”,
http://www.ssc.govt.nz/Documents/working_under_pr/workpr3.html (Retrieved: 5 August 2002).

remains sovereign, with the result that decisions of the Judiciary always remain subject to possible legislative review).

Bearing in mind the fundamental separation of powers, it was my intention, when writing about progress towards the recognition of same-sex relationships in New Zealand, to have three separate chapters – one relating to the Judiciary, one relating to the Executive Government, and one relating to the Legislature.

This proved impossible. While the work of the Judiciary, by virtue of the Quilter same-sex marriage case, is distinctly autonomous, it proved logistically impossible to separate the work of the Executive from that of the Legislature. If I had pursued my intended approach, the result would have been a false and cumbersome separation and, because of the need for continuous cross-referencing from one chapter to another, would not have flowed logically.

It became clear that, while the Judiciary is somewhat detached, there is an extremely close relationship between the legislative and administrative arms of Government. This in turn manifests in a highly politicised administrative arm of Government. Persons who are elected to Parliament as representative Members, are then elected by one another to Ministerial positions within Cabinet. Ministers of Cabinet then return to sit in the House as ordinary Members of Parliament.

Unfortunately, when performing the role of Member of the legislature, they do not take off their Ministerial hat. This means that, rather than approaching a consideration of any legislation before the House purely from an objectively informed, idealist or philosophical point of view, they tend to approach it in light of the prospective ease of administration.

Conversely, when they return to their Ministerial offices, rather than approaching issues from a purely pragmatic, administrative point of view, their thinking is coloured by the political – “how can I get runs on the board?”. In this instance, what then often tends to happen is that policy-makers rely on the political wishes direction of the Ministers, and fail to give full and frank, honest, impartial and comprehensive advice.

My view on this issue is based in personal observation, and situations I have witnessed where information has been “edited” by officials, prior to

it being forwarded to a Minister, on the basis that it might not represent a politically viable course of action. There is no malfeasance in this instance, merely a breakdown of the conventions relating to the separation of powers.

It is my contention also that Ministers are tending to confuse their dual roles of Ministers (members of the Executive Government) and Members of Parliament (members of the Legislature and representatives of the electors). When a Minister of the Crown speaks in his or her capacity as Minister, he or she should be speaking from the perspective of a Government administrator. When a Minister of the Crown is speaking in his or her capacity as a Member of Parliament (a Member of the Legislature), he or she should be speaking as a representative of his or her political party or his or her constituents. A Minister should not be speaking, in his or her capacity as Minister, from a personal and political perspective.

A blurring of these two roles has never been demonstrated more clearly by anyone than by Hon Sir Douglas Graham, a former Minister of Justice. Sir Douglas was often introduced in public meetings or television debates as the Minister of Justice, and then proceeded to express a personal point of view. For example, in response to the Opposition Spokesperson's ⁴⁹ claim that the Minister should act to include gays and lesbians under de facto law, said:⁵⁰

I wouldn't support that. [‘Why not?’] I don't see that as a satisfactory relationship. [‘Can you tell me why?’] I just personally don't agree with it. Perhaps I'm a bit old-fashioned. [‘Isn't that discriminating against the gay community?’] I'm not saying that they should be outlawed or thrown in gaol, I'm just saying that I don't see that in the same category as marriages, and I certainly don't see it even in the same category as de facto marriages.

Ministers and Officials (Ministerial responsibility)

As noted above, the fundamental role of officials within Government agencies is to provide their Ministers with full and frank advice on the

⁴⁹ Ms Judith Tizard.

basis of which Ministers can then make administrative decisions. It is not the role of officials to make these decisions on behalf of their Ministers – but they do. Rather than undertake research and analysis of the relevant issues and present a range of options to Ministers, perhaps with one or more options highlighted as being the most appropriate, officials often present papers outlining what they think the Minister might like to hear.

Conversely, Ministers often tell officials what direction they wish particular advice to take, rather than permitting officials to adhere to their prescribed role of providing full and frank advice from which Ministers may then make their decisions.

From time to time, the relationship between Ministers and their officials may break down to the point where a Minister, who is ultimately responsible for the administration of his or her portfolios, will transfer blame for shortcomings onto the officials.

Along with their appointments to relevant portfolios, Ministers also receive the authority to act to administer those portfolios, and they become subject to the convention of collective Ministerial Responsibility:⁵¹

The principle of collective responsibility underpins the system of Cabinet government. It reflects democratic principle: the House expresses its confidence in the collective whole of government, rather than in individual Ministers. Similarly, the Governor-General, in acting on ministerial advice, needs to be confident that individual Ministers represent official government policy. In all areas of their work, therefore, Ministers represent and implement government policy.

⁵⁰ "When Love Sours", 'Assignment' Documentary on Partnership Property, TVNZ (31 August 1995). Note: The questions in square brackets are questions asked by the interviewer.

⁵¹ Cabinet Office, Cabinet Manual 2008, Department of Prime Minister and Cabinet, <http://www.cabinetmanual.cabinetoffice.govt.nz/node/64#5.22> (Retrieved: 7 August 2009).

Ministerial responsibility also means that:⁵²

- Ministers are individually responsible to the legislature for the powers Parliament has assigned to the portfolio each holds;
- Ministers are responsible for their own actions, as well as for the actions of the subordinate departmental officials, “including the actions of all officials under their management and direction, whether or not the Ministers had prior knowledge”,⁵³ and even for what has occurred in the portfolio prior to his or her current appointment (not for the past action per se, but for further acts which the current Minister has done – or failed to do – in relation to, or as a consequence of that original act);
- Ministers are to answer questions put to them in the House ... on all subjects that fall within their responsibilities;
- Departmental officials may be called upon as witnesses before parliamentary committee to answer questions on behalf of their Ministers; and
- Ministers can be individually named and blamed for maladministration, even censured by the legislature, but they cannot be removed from office by the legislature. Officials, have no “separate constitutional persona”⁵⁴ and should not be named, although, in recent times, it is arguable that there has been less respect for this principle than previously.⁵⁵

Conversely, it is the role of officials to make decisions for Ministers daily acting on their Minister’s authority, and being responsible to their

⁵² Aucoin, Peter, Smith, Jennifer, and Dinsdale Geoff, Responsible Government: Clarifying Essentials, Dispelling Myths And Exploring Change, Canadian Centre for Management Development, Canada (2004): 26.

⁵³ Canada Privy Council Office, “Governing Responsibly: A Guide For Ministers And Ministers Of State”, Canada Privy Council Office (December 2003): <http://www.pco-bcp.gc.ca/index.asp?lang=eng&page=information&sub=publications&doc=agr/2004/annex-eng.htm> (Retrieved: 12 August 2009).

⁵⁴ Aucoin, Peter, Smith, Jennifer, and Dinsdale Geoff, Responsible Government: Clarifying Essentials, Dispelling Myths And Exploring Change, Canadian Centre for Management Development, Canada (2004): 35.

⁵⁵ Thomas, Prof Paul G., “A Canadian Perspective On ‘The New Public Service’ ”, Commentary presented to the Annual Conference Of The Institute Of Public Administration Of Canada (25-Aug-2003).

Minister who nonetheless retains the ultimate constitutional responsibility. For this reason, it falls to officials to act in a diligent, prudent, non-partisan and professional manner, and to be held accountable (not blameworthy) for their actions. If officials fail to act in a proper manner, then it is appropriate for them to accept responsibility for that improper behaviour.⁵⁶

Ministers and the Judiciary

Generally, the arm's-length relationship between the Judiciary and the other two branches of Government has been maintained. It would certainly be fair to say that, in New Zealand, the Judiciary has generally acted in a manner which has not usurped the power of Parliament. This was seen in the Quilter case where the Justices of the Court of Appeal, once they have made their determination that marriage in New Zealand could not be opened up to same-sex couples, deferred to Parliament any possibility of changing that law.

Occasionally there has been a comment made by a member of the Executive or the Legislature about a member of the Judiciary, but this is a rarity and usually draws some criticism on the basis of improper interference with the Judiciary. For example, Hon John Banks, as a Cabinet Minister made some harshly critical comments about the judiciary resulting in his resignation from Cabinet on 1 November 1996.⁵⁷ This was followed by a statement of support for the Judges from the Attorney-General of the time, Hon Paul East who stated that:⁵⁸

he had every confidence in the ability of the judges to exercise their powers ... The public should remain confident that New Zealand is extremely well-served by a judiciary of the highest quality.

⁵⁶ Most Government Departments and agencies have Codes of Conduct that codify these responsibilities.

⁵⁷ "Hon John Banks Resigns From Cabinet", Government Press Release (1 November 1996) (Prime Minister, Rt Hon Jim Bolger).

⁵⁸ "Attorney-General Backs Judges' Ability To Determine Bail Issues", Government Press Release (6 November 1996) (Attorney-General, Hon Paul East).

Hon Phil Goff, as a former Minister of Justice, criticised judges' interpretation of new legislation relating to sentencing of offenders, saying that:⁵⁹

Some statements from Judges indicate that not all of them have read and clearly understood what the new legislation allows. ... While any new legislation takes some time to settle in, Judges need to take the time to read the law to avoid mistakes of this kind.

He then went on to cite two specific cases where he considered that the Judge involved had got it wrong, in one case saying:

Clearly the Judge could have imposed a sentence of reparation in this case. It is not satisfactory that basic mistakes of this nature are being made.

And in another:

The Judge's mistaken belief was a front-page headline ... notwithstanding that the error was pointed out both to the judiciary and the media.

There has been some response to this criticism from other politicians, but generally very little has been made of the possibility of this being an inappropriate attack on the Judiciary by a Minister of the Crown:

The Minister knows that Judges cannot defend themselves against his accusations under our constitutional conventions ... When will the Attorney-General Margaret Wilson do her constitutional duty and start defending the judges against her colleague?

International Human Rights Treaties

The Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR) was the first significant United Nations international human rights instrument. In relation to the topic at hand, the UDHR has some interesting provisions. The Preamble to the Declaration contains a detailed expression of the

⁵⁹ "Goff's Attack on the Judiciary is Scandalous", Press Release, Act New Zealand (3 August 2002) (Stephen Franks, MP).

broad principles underlying the UDHR and, in particular, states:

*... the peoples of the United Nations have in the Charter reaffirmed their **faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women** and have determined to promote social progress and better standards of life in larger freedom,*

*... Member States have pledged themselves to achieve, in cooperation with the United Nations, **the promotion of universal respect for and observance of human rights and fundamental freedoms**, ... [Emphasis added]*

Therefore, the signatories have agreed that, in general terms, individual human rights are worthy of recognition and protection. Furthermore, they have agreed to what constitutes those rights and they have agreed to educate, promote respect for those rights. What is most significant, however, is that the signatories have agreed **to implement measures by which those rights are recognised and observed.**

In short, by agreeing to the provisions of this Declaration, New Zealand as a Member State can be seen to have agreed to recognise and protect the rights of its citizens.⁶⁰

The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR) was adopted and opened for signature, ratification and accession on 16 December 1966 by Resolution 2200A (XXI) of the General Assembly of the United Nations. The ICCPR entered generally into force on 23 March 1976 with ratification by New Zealand on 28 December 1978. The ICCPR contains many of the same provisions as the UDHR, although some have a slightly different wording. The Preamble provides:

*The States Parties to the present Covenant, considering that, ... **recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family** is the foundation of freedom, justice and peace in the world, ... [Emphasis added]*

*Recognising that, ... **the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights**, as well as his economic, social and cultural rights, ... [Emphasis added]*

Agree upon the following Articles ...

Further, Article 2 of the ICCPR provides:

- 1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.*
- 2. Where not already provided for by existing legislative or other measures, **each State Party to the present Covenant undertakes to take the necessary steps, ... , to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.** [Emphasis added]*

By agreeing to the provisions of the ICCPR, New Zealand as State Party to the Covenant can be seen to have agreed to enact forthwith legislation to recognise and protect the rights of its citizens 'without distinction of any kind'.⁶¹

What are the issues?

The intention of this section is to select some of the main issues and deal with them by way of an examination of the provisions themselves and their interpretation to date. These interpretations are also examined, in some instances, in light of the changing human rights atmosphere in order to assess whether such interpretations are still relevant after recent changes in human rights law.

⁶⁰ See discussion on 'legitimate expectation' later in this Chapter.

⁶¹ See discussion on 'legitimate expectation' later in this Chapter.

The key issues which will be examined are:

- (1) Non-discrimination under the international covenants;
- (2) The inclusion of gays and lesbians:
 - (a) Government obligations;
 - (b) “Sex” discrimination includes “sexual orientation” discrimination;⁶²
 - (c) “Other status” and the term “such as” include “sexual orientation”;⁶³
 - (d) The non-exhaustive nature of the list of grounds of discrimination;
- (3) The meaning of “protection at law”.⁶⁴
 - (a) the right to privacy / non-interference;⁶⁵
 - (b) the right to form a family;⁶⁶
 - (d) the right to marry;⁶⁷
 - (e) the right to equality in public service.

The issues discussed

There are several general points which assist in the interpretation of legal documents. Some of these will be raised in the course of the discussions below, however, it is pertinent to outline, at this point,

⁶² UDHR Art.2; ICCPR Art.2.1 and Art.26; ICESCR Art.2.2.

⁶³ UDHR Art.2; ICCPR Art.2.1 and Art.26; ICESCR Art.2.2.

⁶⁴ UDHR Preamble; ICCPR Preamble, Art.2.2 and Art.26; ICESCR Preamble, and Art.2.1.

⁶⁵ UDHR Art.12, Art.29.2 and Art.30; ICCPR Art.3, Art.17.1 and Art.17.2; ICESCR Art.3, Art.4, Art.5.1 and Art.5.2.

⁶⁶ UDHR Art.16.1, Art.16.2 and Art.16.3; ICCPR Art.23.1, Art.23.2 and Art.23.4; ICESCR Art.10.1.

⁶⁷ UDHR Art.16.1 and Art.21.1; ICCPR Art.23.2; ICESCR Art.3.

overarching precepts of the statutory interpretation of human rights provisions:⁶⁸

- (1) The general rule of interpretation of international law treaties is that they “shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁶⁹
- (2) Human rights instruments generally are given a fair and liberal interpretation. It is the nature of human rights law that interpretation be expansive rather than restrictive.⁷⁰
- (3) Human rights is a quickly evolving area, and for that reason human rights instruments must be formulated in a manner which allows for an evolving interpretation.⁷¹ This implies that whenever possible, human rights provisions should be interpreted in accordance with contemporary social values and standards.
- (4) Human rights legislation was initially formulated to recognise strictly individual rights but this recognition has now been extended to include group rights.⁷² There is also an expansion of individual rights to include those of individuals within groups (for example, discrimination against an individual as a member of a particular group, or individuals as partners to a relationship).

(1) Non-discrimination under the international covenants

“Non-discrimination” and “equality before the law” and “equal protection of the law without any discrimination” constitute a “basic and general principle relating to the protection of human rights”.⁷³

⁶⁸ See discussion relating to Tavita v Minister of Immigration [1994] 2 NZLR 257, later in this chapter.

⁶⁹ Vienna Convention on the Law of Treaties Art.31.

⁷⁰ This is a general principle relating to the interpretation of human rights laws. The general principle is supported in, amongst others, Coburn v Human Rights Commission [1994] 3 NZLR 323, in which Thorp J cited various cases to conclude by speaking of “the need for a fair, broad, and liberal interpretation”: 335.

⁷¹ Tavita v Minister of Immigration [1994] 2 NZLR 257: 266: “The law as to the bearing on domestic law of international human rights and instruments declaring them is undergoing evolution”.

⁷² As evidenced by the increasing emergence of human rights instruments such as the draft “African Peoples’ Charter”, a proposed human rights treaty to deal with the rights of indigenous / ethnic groups.

⁷³ United Nations Human Rights Committee, General Comment No.18 – on the meaning of “Non-Discrimination” (10 November 1989).

States parties who have ratified the ICCPR, have agreed to:

- “respect and ensure to all persons within its territory and subject to its jurisdiction the rights recognised in the Covenant without any distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁷⁴

Other provisions repeat similar notions:

- “The States parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.⁷⁵
- “Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions ... to have access, on general terms of equality, to public service in his country”.⁷⁶
- “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.⁷⁷

It is worth noting that there is a key distinction between Article 2.1 and Article 26 of the ICCPR, which at first glance appear to be remarkably similar in their effect.

Article 2.1 states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

⁷⁴ United Nations Human Rights Committee, General Comment No.18 – on the meaning of “Non-Discrimination” (10 November 1989).

⁷⁵ ICCPR Art.3.

⁷⁶ ICCPR Art.25(c).

Article 26 states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In actual fact, these two provisions are quite different, the key words being “the rights recognised **in the present covenant**” contained in Article 2.1. These words are not contained in Article 26 with the effect that Article 26 applies to any form of discrimination whether or not expressly contained in the ICCPR. The UNHRC states that “when legislation is adopted by a State party, it must comply with the requirement of 26 that its content should not be discriminatory”. This is a far-reaching provision.

It is to be noted that the ICCPR does not contain any definition of “discrimination”. However, the United Nations Human Rights Committee has analogised definitions from two other United Nations Conventions (namely, the International Convention on the Elimination of All Forms of Racial Discrimination, Article 1, and the Convention on the Elimination of all Forms of Discrimination Against Women, Article 1, to conclude that the term “discrimination” in the ICCPR should be understood to imply:⁷⁸

any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

(2) Inclusion of gays and lesbians

It is intended that gays and lesbians should be included within the provisions of the international law treaties.

⁷⁷ ICCPR Art.26.

⁷⁸ United Nations Human Rights Committee, General Comment No.23 – on the meaning of “Non-Discrimination” (10 November 1989).

Firstly, it is clear that these provisions are intended for **all** persons.

Secondly, it is clear that the intention of the provisions is to eliminate **all** forms of discrimination.

The UDHR, for example, talks of “the inherent dignity of all members of the human family”. It does not make any exceptions. It could arguably be different if gays were seeking special privileges, but where gays are merely seeking the same rights as are enjoyed by others within society, then it is clear that they are entitled to be included under the international human rights provisions merely by virtue of their status as “members of the human family”.

This interpretation is further supported by the use of the word “everyone” in Article 2 of the UDHR, and the provision that “everyone is entitled to all the rights and freedoms set out in this Convention, without distinction of any kind”.

(2)(a) Government obligations

The Government is under an obligation to ensure that the rights discussed are available to all persons with its Governmental and parliamentary jurisdiction.

In relation to the relevant international human rights treaties, there is no argument, and can be no argument, that under these Conventions the Governments of the States parties have agreed:

- to “respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognised in the present Covenant without distinction of any kind”;⁷⁹ and
- to “adopt such legislative or other measure as may be necessary to give effect to the rights recognised in the present Covenant”;⁸⁰ and
- to “ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”;⁸¹ and

⁷⁹ ICCPR Art.2.1.

⁸⁰ ICCPR Art.2.2.

⁸¹ ICCPR Art.3.

- that “[a]ll persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground ...”.⁸² It should be noted that this provision is not limited to the scope of this particular Covenant (the ICCPR) but rather is concerned with the obligations accepted by the States party with regard to its legislation generally and the application of that legislation.⁸³

The wording in each of these provisions is clear and strong. In relation to civil and political rights, once the rights are defined and recognised, and the State has ratified the treaty, then that State is under an obligation to implement forthwith whatever measures are necessary to see that all relevant rights are guaranteed.⁸⁴

At the same time, by acceding to the international human rights treaties, New Zealand has accepted the monitoring mechanisms of the United Nations in relation to our compliance with the provisions of those treaties. These monitoring mechanisms include the reporting obligations (reports submitted to, and considered by, the United Nations Human Rights Committee), and the ability of citizens to forward Communications to the United Nations Human Rights Committee alleging a breach of international law to which New Zealand is a signatory (this right arising by virtue of New Zealand’s assignment to the relevant Optional Protocol confirming this complaint making procedure).

Tavita v Minister of Immigration ⁸⁵ was an appeal regarding a Removal Warrant for a male Samoan over-stayer who, while in New Zealand married a New Zealand woman who had subsequently given birth to their baby daughter. Counsel for the Respondent argued that, because the Removal Warrant was issued before the birth of the child, there was

⁸² ICCPR Art.26.

⁸³ United Nations Human Rights Committee, General Comment No.23 – on the meaning of Article 26 (10 November 1989).

⁸⁴ At international law, civil and political rights are immediately enforceable, unlike economic, social and cultural rights which can be gradually realised. On this basis the incremental approach, and the “politically pragmatic” approach, adopted by the New Zealand Government is at direct odds with the international human rights law.

⁸⁵ Tavita v Minister of Immigration [1994] 2 NZLR 257 (Court of Appeal).

no need for the Immigration Service to take international law into account. Cooke P disagreed stating:⁸⁶

That is an unattractive argument, apparently implying that New Zealand's adherence to the international instruments has been at least partly window-dressing. ... legitimate criticism could extend to the New Zealand Courts if they were to accept the argument that, because a domestic statute giving discretionary powers in general terms does not mention international human rights or obligations, the executive is necessarily free to ignore them.

Cooke P also cited Ashby v Minister of Immigration⁸⁷ stating that in that case the Court of Appeal recognised “that some international obligations are so manifestly important that no reasonable Minister could fail to take them into account”.⁸⁸

(2)(b) “Sex” Discrimination Includes “Sexual Orientation”

The United Nations Human Rights Committee (UNHRC) has made a definitive statement on this matter. In Toonen v Australia, Toonen claimed that two provisions of the Tasmanian Criminal Code caused his private life and liberty to be threatened.⁸⁹

Toonen did not, in the Communication, argue the issue of the interlink between the grounds of “sex” and “sexual orientation”. In the process of the case, however, the State party (Australia) sought clarification from the Committee about whether or not the term “other status” in Articles 2.1 and 26 of the ICCPR included “sexual orientation”.

The Committee did not offer an opinion in response to that particular question, but stated:⁹⁰

The Committee confines itself to noting, however, that in its views, the reference to sex in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.

⁸⁶ Tavita v Minister of Immigration [1994] 2 NZLR 257: 266.

⁸⁷ Ashby v Minister of Immigration [1981] 1 NZLR 222.

⁸⁸ Tavita v Minister of Immigration [1994] 2 NZLR 257: 266.

⁸⁹ The relevant provisions are: section 122, “unnatural sexual intercourse” or “intercourse against nature”; and section 123, “indecent practice between male persons”.

It should be noted that, for purposes of the interrelationship of New Zealand's domestic law with international law, both New Zealand's HRA and BORA expressly include the terms "sex" and "sexual orientation".

(2)(c) "Other status" and "such as" include "sexual orientation"

Because the United Nations Human Rights Committee did not answer directly the question posed by Australia, the question as to whether or not the ground of "sexual orientation: is included under the term "other status" was left unresolved.

First, any consideration of this issue must reflect the fundamental objectives of the international human rights instruments. It has been shown that the key purposes of these instruments are to ensure that all persons are treated with dignity and respect, that all persons receive equal protection under the law, and that all persons should be free from discrimination.

Second, a precedent has been set by the inclusion of "sexual orientation" as an analogous ground in the Canadian Charter of Rights and Freedoms. Although the Canadian Charter does not use the term "other status", its general form is open-ended. As a result, the Canadian Parliamentary Committee on Equality Rights agreed that "sexual orientation" should be read into section 15 of the Charter as a constitutionally prohibited ground of discrimination.⁹¹

Third, it should be noted again that both New Zealand's HRA and BORA expressly include the terms "sex" and "sexual orientation". It is clear that any consideration at international law must provide for this.

⁹⁰ Toonen v Australia, Communication No.488/1991: Australia 04/04/94.

⁹¹ Canadian Parliamentary Committee on Equality Rights, "Equality for All: Report of the Parliamentary Committee on Equality Rights", Canadian Parliamentary Committee on Equality Rights, Ottawa (1985); and Henson, Deborah M., "A Comprehensive Analysis Of Same-Sex Protections: Recommendations For American Reform", in [1993] 7 International Journal of Law and the Family 282: 290. The Canadian Charter of Rights and Freedoms s.15(1) states: "Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."

(2)(d) The lists are non-exhaustive

Similarly, it is clear that by the use of the term “such as”, the lists given in the various instruments were not intended to be exhaustive and were to be left open for the inclusion of other appropriate classes.

Under the accepted techniques of statutory interpretation the use of words like “such as” means that the following are merely examples and that there are other characteristics that can be added to the list.

Once again, as noted above, New Zealand’s HRA and BORA expressly include the terms “sex” and “sexual orientation”. It is clear that any consideration at international law must provide for this.

(3) The meaning of “protection at law”

There is nothing in the international Conventions to suggest that some protections of the law should be reserved for specific groups and denied to others, or that gays are not included. The very nature of these instruments and their wording, is that they are intended to be all-embracing and all-inclusive **in order to overcome discrimination**.

(3)(a) The right to privacy / non-interference

Article 17 of the ICCPR states:⁹²

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

“Family” is to be interpreted broadly to include all those comprising the family as understood in the society of the State party concerned.⁹³

⁹² ICCPR Art.17.

⁹³ United Nations Human Rights Committee, General Comment – on the meaning of Article 17 (1988).

“Arbitrary interference” is to be interpreted to mean that, even where the State retains a power to intervene in private or family issues, such interference must be “in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances”.⁹⁴ In general terms, the State has no entitlement to interfere in the privacy of a person except where there is some grave concern for the well-being of that person, or the well-being of others.

The right to freedom from interference in private lives logically extends to the freedom of same-sex couples to be able to formalise their relationship in the manner they see fit, subject only to the extent that this would interfere with the rights of others. There is nothing to suggest that if same-sex couples were to be granted access to marriage as a means of formalising their relationship that this would be any more invasive or offensive to society generally than experienced currently with opposite-sex marriage. Same-sex marriage would grant a marital status to gay couples and the ability to live their private lives and arrange their personal affairs as they wish, not a right to encroach on other peoples' lives and act offensively.

(3)(b) The right to form a family

Does a gay couple living in a committed relationship, with or without children, constitute a “family”?

The concept of “family” is discussed at length in Chapter 6. While not going into the material covered by that chapter, it is helpful to examine more closely the term “family” in relation to the international human rights documents.

Unfortunately, there is no definition of the family given in the body of any of the documents nor in any of the Travaux Préparatoires' to the

⁹⁴ United Nations Human Rights Committee, General Comment – on the meaning of Article 17 (1988).

ICCPR. However, from the General Comments and Views ⁹⁵ of the Human Rights Committee several conclusions can be drawn:

- (1) Because these treaties are signed by a variety of different member states, it can be assumed that the definition of family must be flexible enough to cater for differing cultural constructs;⁹⁶
- (2) This implies, therefore, that the definition of family may evolve and that this evolution should be reflected in the laws of the states. This is further supported by the European Court of Human Rights which stated that “societal ideas about the family continue to develop, and that law should reflect this”.⁹⁷
- (3) The state therefore has the power to define for itself an appropriate meaning for the term “family”, however:⁹⁸

[i]t is only justifiable to define the family in such a way as to exclude certain groups or individuals if ‘objective’ and ‘reasonable’ criteria exist for such exclusion.

It is contended therefore that there is no reason whatsoever why a gay couple in a committed relationship should not be seen to constitute a family. What is more, there is no reason whatsoever why that family should not gain the full recognition and sanction of the State.

(3)(c) The right to marry

Article 23(2) of the ICCPR recognises:

The right of men and women of marriageable age to marry and to found a family ...

⁹⁵ For example: Hendricks v Netherlands 5 EHRR 223 1982: “The natural link between parent and child was of fundamental importance. When the actual ‘family life’ in the sense of ‘living together’ had ended, continued contact between them was desirable and should in principle have remained possible. Respect for family life implied that this contact was not to be denied unless there were strong reasons under Article 8(2) to justify such interference”.

⁹⁶ United Nations Human Rights Committee, General Comment – on the meaning of Article 17 (1988).

⁹⁷ Ghandhi and MacNamee, “The Family in UK Law and the International Covenant on Civil and Political Rights 1966”, in [1991] 5 International Journal of Law and the Family 104: 108.

⁹⁸ Ghandhi and MacNamee, “The Family in UK Law and the International Covenant on Civil and Political Rights 1966”, in [1991] 5 International Journal of Law and the Family 104: 105.

There is a suggestion from some opponents of same-sex marriage that marriage is not, in fact, a human right.⁹⁹ They argue that, on this basis, there can be no claim for the right to marry. This can be answered easily on more than one level.

- The language of the Conventions themselves is quite clear, plainly refuting by their adoption of specific terminology. Article 23(2) of the ICCPR, for example, refers explicitly to “The right of men and women of marriageable age to marry ...”.
- The United Nations Human Rights Committee has also written a General Comment on “Protection of the Family, the Right to Marriage, and Equality of the Spouses”.¹⁰⁰
- The same notion has also been supported in the context of New Zealand human rights law by Justice Thomas when he stated that: “They [same-sex couples] are denied a basic civil right in that the freedom to marry is rightly regarded as a basic civil right”.¹⁰¹
- In Halpern v Canada (2002) 60 O.R. (3d) 321, the Court of Appeal of Ontario stated that: “Denying same-sex couples the **right to marry** ...” perpetuated the view that same-sex relationships do not deserve the same recognition and respect that is given to different-sex relationships.¹⁰²

It must also be remembered that, while it is arguably possible to claim the right to marry, the battle for same-sex marriage is not only about the right to marry, but also, and much more fundamentally and more importantly, it is about the right to equal treatment before and under the law.

⁹⁹ In the debate on the Matrimonial Property Amendment Bill (subsequently renamed the Property (Relationships) Bill 2000), Owen Jennings MP (Act NZ), stated: “ ... marriage is not a human rights issue. Marriage does not exist in any culture on the basis that it is a human right”, Hansard: Parliamentary Debates (04-May-2000): 1947.

¹⁰⁰ United Nations Human Rights Committee, General Comment – on the meaning of “Protection of the Family, the Right to Marriage, and Equality of the Spouses” (27 July 1990).

¹⁰¹ Quilter v Attorney-General [1998] 1 NZLR 523.

¹⁰² Halpern v Canada (2002) 60 O.R. (3d) 321: 347.

In a similar vein, it has been suggested that marriage is not a right but a privilege, and is therefore a privilege to be granted by the state.¹⁰³ I do not accept this notion.

However, let us consider this further. Even if marriage were to be seen as a privilege to be conferred by the State on certain citizens, on what basis would the State be entitled to decide that different-sex couples should be permitted this privilege, but same-sex couples should not? Additionally, this line of argument begs the question that, if marriage is not considered to be a 'right', what else is not considered a right – access to legal counsel, domicile? The fundamental issue here, regardless of categorization, is the issue of equal treatment before and under the law.

There are very few acceptable exceptions to the principle of non-discrimination. Basically, different-treatment that is less favourable is acceptable if that less favourable treatment is objectively justifiable. And, different treatment that is preferential is acceptable if it is designed to redress an imbalance caused to a particular group by prior discrimination.

In its General Comment on Non-Discrimination, the United Nations Human Rights Committee states that:¹⁰⁴

The principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. ... Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.

There is no suggestion that "preferential treatment" should be permitted merely because of a social desire to privilege one group, over another.

It is clear that the right to marry is a human right.

¹⁰³ Amongst others, for example, Wardle, Lynn D., "Some New Threats to Marriage and the Marriage-Based Family: A Review and Responses", in [2000] 48 Cutting Edge 38: 44-46.

¹⁰⁴ United Nations Human Rights Committee, General Comment No. 18 – on the meaning of Non-Discrimination (10 November 1989).

The next issue is therefore whether the international covenants extend that right to same-sex couples or they reserve it for different-sex couples.

There is no reason to suggest that international law excludes same-sex couples from marriage.

Firstly, there is no definition of marriage at international law. Therefore, marriage is not expressly restricted to a man and a woman. It can therefore quite clearly be argued that to exclude gays and lesbians from the status of marriage constitutes discrimination based on (a) sexual orientation, and (b) sex (gender).

There has been a suggestion that the reference to the “right of men and women of marriageable age to marry” is to the right of a man to marry a woman, and the right of a woman to marry a man. The ‘Travaux Préparatoires’ of the ICCPR are not as specific as this on this matter.¹⁰⁵ On the one hand, the phrase “men and women” as used in the ICCPR is used broadly in a manner open to the interpretation that there is not requirement for parties to be of different gender. There is no express definition requiring parties to be of different gender.¹⁰⁶ On the other hand, when considering the issue of ‘equality of spouses during marriage and at its dissolution’, reference is made to “husband and wife”.¹⁰⁷

The language of the ICCPR is not conclusive as to the meaning of the word ‘marriage’, especially when it is considered that the language of international covenants is intended to be sufficiently flexible to allow for regional differences, and that the provisions relating to marriage are, or should be, subject to the equality provisions. In this light, the authors to the Joslin Communication submitted that that:¹⁰⁸

the phrase "men and women" in art 23.2 cannot be used to argue that only a man and a woman may marry. Rather the words, on their natural meaning, suggest that men as a group and women as a group may marry. Similarly,

¹⁰⁵ “Travaux Préparatoires’ consist of notes relating to proposals for drafting of the ICCPR (in this instance) and include proposals for changes in drafting and whether or not those proposed changes were incorporated into the final document.

¹⁰⁶ Bossuyt, Marc J., Guide To The “Travaux Préparatoires” Of The International Covenant On Civil And Political Rights, Martin Nijhoff Publishers (1987): 442-446.

¹⁰⁷ Bossuyt, Marc J., Guide To The “Travaux Préparatoires” Of The International Covenant On Civil And Political Rights, Martin Nijhoff Publishers (1987): 447.

¹⁰⁸ Submission of the Authors, Communication No. 902/1999, Joslin v. New Zealand.

while the French text of the Covenant is expressed in the singular (“à l’homme et à la femme”). The French text makes no reference to “a man” and “a woman” (“à une homme et à une femme”), but rather to “the man” and “the woman”, which the authors submit is equivalent to “men and women” generically.

Another argument, often propounded, is that gays currently do have the right to marry in that, in the same way as any other person, they have a right to marry someone of the opposite sex. The argument further goes that, because being gay is a “choice”, then gays themselves are choosing not to marry someone of the opposite sex.¹⁰⁹

Under Article 12 of the European Convention on Human Rights, the right to marry is protected “according to the national laws governing the exercise of this right”. The relevant Articles in the ICCPR do not have any such qualification and therefore standards must be taken as being established, at least in the first instance, by the international protections rather than by the domestic.

It would seem that if a State does not regulate homosexual behaviour any differently from heterosexual behaviour, and the State has human rights laws which prohibit discrimination on grounds of sexual orientation, then it is inconsistent and arbitrary to deny gays the right to legally recognise those State-sanctioned relationships by marriage.

(3)(e) The right to equality in public service

Article 25 of the ICCPR states:¹¹⁰

*Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: ...
(c) to have access, on general terms of equality, to public service in his country.*

The matter of whether or not the issuance of a marriage licence by the Office of the Registrar of Births, Deaths and Marriages constitutes a “public service” has been the subject of debate.

¹⁰⁹ For example, see Justice Gault in Quilter v Attorney-General [1998] 1 NZLR 523: 526.

¹¹⁰ ICCPR Art.25.

Marriage licences are issued by officials within Department of Internal Affairs. These are public offices administered by the Ministry of Justice and part of the New Zealand Government service to provide a service to members of the public. The Officers of that Department are New Zealand public servants.

On the face of it, the act of issuing a Marriage Licence constitutes a public service.

Summary

In general, therefore, it can be argued that international human rights provisions support the recognition of same-sex marriage – although this may not be so evident since the decision in Joslin.¹¹¹ The general schema on which this proposition is based can be outlined as follows:

- (1) There are a multitude of international legislative provisions which support the inclusion of gays within their-parameters.
- (2) There are numerous international provisions which support the contention that domestic governments who, acting in accordance with Parliamentary will, contract into international human rights agreements accept an obligation to actively implement promote the provisions of those treaties.
- (3) The Government of New Zealand is therefore under an obligation to actively implement and promote legislation, policy and practice to eliminate discrimination against gays and lesbians.

COURAGE

Assuming that, as a society generally, we do have a commitment to human rights standards, it would seem reasonable to assume that many, if not all, of our human rights concerns would be answered. For example, if all New Zealanders were committed to the concept of equal treatment under the law, there would be no need for this thesis.

¹¹¹ See discussion in Chapter 8 on Joslin v New Zealand Communication No. 902/1999.

Sadly, the reality is that the commitment of politicians, because of the very nature of politics, is to argue for or against a particular issue not based on what is right or wrong, but what is politically expedient for them, as individual politicians or as members of a particular political party.

It is important, therefore, that our watchdogs, be they quasi-Governmental organizations such as the Human Rights Commission, or private citizens, have the courage to challenge any failure to adhere to the principles laid out in our human rights legislation. A prime example of this occurred when the 1996-1999 Government attempted to halt the “Consistency 2000” Project in 1997 and provide for a permanent exemption from human rights compliance for Government. It was the commitment and courage (and the clarity and consistency of the message) of individuals and groups who lobbied Parliament saying the proposed shift in human rights legislation was not acceptable that resulted in the plans for the exemption being permanently shelved.

Without individuals and groups exercising this courage and challenging our administration, Governments will continue to ignore human rights standards (as has been the case with the Compliance 2001 programme) or to put forward for the consideration of the House, legislation which compromises those human rights standards.

In the previous section, I suggested that the first stage in ensuring human rights compliance is a commitment to human rights standards. Unfortunately, I am not convinced that we have that commitment in New Zealand – at Governmental / Parliamentary level, in society at large, or even within our own gay and lesbian communities. Without such a commitment, there is slim hope of acceptable compliance with human rights being achieved.

This means that for those who do have a genuine commitment to human rights standards and compliance with those standards, there is a call for the courage to stand by that commitment in the face of challenge from others.

When it comes to issues such as sexual orientation (and especially the protection of human rights on the basis of sexual orientation), there can be some very negative and very dogmatic arguments thrown up from a range of sources. It is not easy for persons who come from a position of disempowerment to challenge some of the assertions made against them. This may entail, in the first instance, the courage to come out and be visible, and to tell the personal stories of how the failure to provide full equality under the law impinges on their everyday lives.

Constitutional Watchdogs and other Statutory Bodies

Within our justice system (in the widest sense) there are institutions that are described as “constitutional watchdogs”. The role of these institutions is to “oversee, support and advise government institutions” and to “help to ensure that public and executive powers are exercised for the public good”.¹¹² These institutions include, amongst others, the Human Rights Commission, the Commissioner for Children, the Families Commission, the Health and Disabilities Commissioner, and the Office of the Ombudsman. There are also non-Government statutory bodies, an example being the New Zealand Law Commission which was established as “a central advisory body for the review, reform, and development of the law of New Zealand”.¹¹³

All of these bodies are able to contribute to the goal of compliance with human rights standards by advising Government on legal / human rights issues. As independent agencies they are also able, theoretically at least, to challenge Government and Parliament on any failure to adhere to such standards.

¹¹² Ionatana, Hon, Ionatana, Prime Minister of Tuvalu, “The Importance And Central Role Of Monitoring Institutions And Officials In Upholding Democratic Principles Of Good Governance”, paper presented to the Pacific Parliamentarians Conference, Nadi, Fiji (27-30 March 2000), http://fiji-gov.apdip.net/ppc/docs/PAPER_Session5.PDF (Retrieved: 23 September 2002).

¹¹³ Law Commission Act 1985: Title.

Amongst other things, constitutional office-holders are charged with:¹¹⁴

1. watching, guarding and supervising public authorities and the working of a bureaucracy, and promoting transparency and accountability in the exercise of executive power, and helping to eliminate the misuse and abuse of such powers;
2. promoting public confidence in government and its bureaucracy and thereby helping to support the smooth performance of government policies and parliamentary institutions; and
3. remaining constantly aware of flaws in the system and places where flaws exist or are likely to develop and where reforms are desirable or necessary, and to provide advice on how needed reforms might be most effectively and efficiently implemented.

One of the key functions of constitutional watchdogs is to provide a check against the “rampant power” of any one of the three branches of Government. This means that there must be avenues for the minority group to be able to put forward their views on how they are affected, what the issues mean for them, and to have those views listened to in a meaningful way. It also means that those institutions, quasi-Governmental or non-Governmental, which are charged with supporting minority groups, or with advising Parliament on issues of justice, must actively pursue their core objectives.

¹¹⁴ Ionatana, Hon, Ionatana (Prime Minister of Tuvalu), “The Importance And Central Role Of Monitoring Institutions And Officials In Upholding Democratic Principles Of Good Governance”, paper presented to the Pacific Parliamentarians Conference, Nadi, Fiji (27-30 March 2000): http://fiji-gov.apdip.net/ppc/docs/PAPER_Session5.PDF, (Retrieved: 23 September 2002).

Note: I will comment further, later in this chapter, on the role of two of these constitutional watchdogs – the New Zealand Law Commission and the Human Rights Commission – and how, I believe, they have (at best) let down gays and lesbians seeking equal access to marriage, and (at worst) undermined the efforts of gays and lesbians seeking such access.

Human Rights Commission

The primary functions of the Human Rights Commission are to:¹¹⁵

- (a) *advocate and promote respect for, and an understanding of, human rights in New Zealand society; and*
- (b) *to encourage the maintenance and development of harmonious relationship between individuals and among the diverse groups in New Zealand society.*

In order to carry out its primary functions, the Human Rights Commission also has a range of further functions including (amongst others):¹¹⁶

- advocating a respect for, and an observance of, human rights;
- inquiring into any law or practice if it appears that it may infringe human rights; and
- reporting to the Prime Minister on means of giving better protection to human rights and to ensure better compliance with standards laid down in international instruments on human rights.

While the Human Rights Act also provides for procedures relating to the settlement of human rights disputes,¹¹⁷ the primary role of the Commission is to ensure, as far as it is able, that disputes do not arise in the first instance. In other words, the onus falls on the Commission to strive towards absolute human rights compliance in all matters of law, practice and procedure.

Human Rights Commission and the same-sex marriage case

In 1996, the Human Rights Commission was invited by the Applicants to become an Intervening Party in the Quilter same-sex marriage case at the High Court in Auckland.

¹¹⁵ Human Rights Act 1993 s.5(1).

¹¹⁶ Human Rights Act 1993 s.5(2).

¹¹⁷ The Human Rights Act 1993 provides for the resolution of complaints about discrimination. As well as complaints being considered by the Human Rights Commission, they can be referred to the Director of Human Rights Proceedings (see ss.90-92A) who will then decide whether or not to refer them to the Human Rights Review Tribunal (see ss.93-126). Alternatively, an individual may, if the Director choose not to proceed, take a complaint to the Tribunal on his or her own behalf.

The Commission declined, stating that on the basis that the application to the High Court was made in reliance on the New Zealand Bill of Rights Act 1990, the matter was outside of the jurisdiction of the Commission. The purpose for which the presence of the Commission was requested was not to address matters specifically stemming from that Act, but rather to provide the Court with expert knowledge about the fundamental meaning of discrimination.

The Applicants felt seriously let down by the actions of the Commission in this instance.

The Applicants' sense of dissatisfaction was supported by Grant Huscroft of the University of Auckland who stated that:¹¹⁸

... one would expect the Human Rights Commission to have a position on this matter, For some reason, however, the Commission has been uncharacteristically silent. Indeed, it has shown no interest in Quilter v Attorney-General ... Quilter raises important questions about equality, the law of discrimination, and the interpretation and application of the Bill of Rights.

Huscroft continues with a discussion of why he considers the Commission may have decided not to become part of the case. In doing so, he outlines three possible reasons which he then discounts:

- The jurisdictional question relating to the fact that the case was brought under the New Zealand Bill of Rights Act 1990 rather than the Human Rights Act 1993. This he discounts, saying that the grounds of discrimination are the same in both Acts, the Commission successfully lobbied for the inclusion of sexual orientation as one of those grounds, and that it could reasonably be expected that the Commission might have an interest in how those grounds would be interpreted by the Courts.
- The Commission may have preferred to address the question of whether or not exclusion of same-sex couples from marriage is

¹¹⁸ Huscroft, Grant, "Same-Sex Marriage and the Human Rights Commission", in [1997] NZLJ 41.

inconsistent with the Human Rights Act 1993 as part of its “Consistency 2000” Report. This he discounts on the basis that, if the Commission considered that the Marriage Act 1955 is discriminatory, there would appear to be no reason why the Commission would prefer a protracted legislative process when there might be an immediate solution through litigation – especially where participation in the litigation would not compromise the “Consistency 2000” Project.

- Possibly, the Commission did not consider that the Marriage Act 1955 to be discriminatory, and that there was no need to be involved. This he discounts on the basis that it would be unusual for the Commission to remain on the sidelines while the Court establishes a precedent which impacts on the law of human rights for years to come.

He then adds, fourthly, that the Commission may have considered it politically expedient not to intervene, and then goes on to say:

There is significant opposition to same-sex marriage, in the government and in the community, and the Commission may wish to avoid the fray. This would be surprising, but in the absence of a satisfactory explanation for its silence, some may well draw this conclusion.

It is now clear, following the new functions set out in the Human Rights Act 1993 s.5 (by virtue of the Human Rights Amendment Act 2001), that all human rights fall within the jurisdiction of the Human Rights Commission (although the complaints mechanism is still constrained to the human rights of non-discrimination).

The New Zealand National Plan of Action

The Human Rights Amendment Act 2001 mandated the Human Rights Commission to develop a National Plan of Action for Human Rights (NPA).

In general terms, the NPA was to constitute a set of strategies for the development and strengthening of the promotion and protection of human rights in New Zealand. The Human Rights Commission said that

in developing the NPA, the Commission needed need to establish its human rights goals and identify national human rights priorities.¹¹⁹

The concept of prioritising human rights is of concern for a range of reasons:

- It is dangerous to prioritise human rights in that this gives rise to a risk of a perception that some rights are more important than others.
- If human rights are to be prioritised, there are inherent difficulties and concerns related to establishing on what basis those priorities should be established:
 - If a decision is based on the views expressed through a consultation process (as in the Commission's press release at the time), then the response is formed on the basis of what most people consider to be the most pressing issues. That is, there is a risk that the most marginalised people will be further marginalised.
 - If a decision is based on statistics relating to the numbers of complaints received by the Commission, the response is formed in favour of those who have the knowledge, resources, ability to make complaints. I would suggest that it may be those groups who are making the least numbers of complaints who have the greatest need. Once again, the already disempowered are in danger of becoming more disempowered.
 - Questions must also be asked about communication with marginalised groups. It may be those groups of people who cannot access a website, who do not receive a newspaper, who do not physically have the ability get to meetings, who do not have the personal strength to attend meetings, or who do not have the strength to tell their own personal / private stories in public – those who do not 'have a voice' – who are the persons most in need of human rights assistance.

¹¹⁹ Human Rights Commission, "Developing A National Plan Of Action On Human Rights": <http://www.hrc.co.nz/index/php?p=23966> (Retrieved: 23 September 2002).

I note that the United Nations, in describing the purpose of National Plans of Action, gives no suggestion that there should be any degree of prioritisation. In fact, it seems that the General Assembly has been very careful to avoid any suggestion of priority by listing, in no particular order, the need to:¹²⁰

- establish or strengthen national and local human rights institutions and organisations;
- initiate steps towards national programmes for the promotion and protection of human rights;
- prevent human rights violations that result in human, social, cultural, environmental and economic costs;
- identify those people in society who are presently deprived of their full human rights and ensure that effective steps are taken to redress their situation;
- enable a comprehensive response to rapid social and economic changes that might otherwise result in chaos and dislocation;
- promote diversity of sources, approaches, methodologies and institutions in the field of human rights education;
- enhance opportunities for cooperation in human rights education activities among government agencies, non-governmental organisations, professional groups and other institutions of civil society;
- emphasise the role of human rights in sustainable national development;
- help Governments meet their prior commitments to human rights under the international instruments and programmes.

After attending a meeting about the NPA at the Commission on 9 October 2002, I forwarded a letter to the Commission (dated 14 October 2002) in which I emphasised some issues that had been expressed by

¹²⁰ UN General Assembly A/52/469/Add.1 (20 October 1997).

myself and others at the meeting. In summary, these key issues were as follows:

- The more disempowered a minority group is, the fewer resources it will have, and the less able it will be, to provide input into the development of a NPA. This does not mean that its members' needs are any less than those of other groups – in fact it more than likely signifies that their needs are greater.
- It is not appropriate for the Human Rights Commission to hierarchise human rights and to give some rights greater priority over others. There are 14 grounds of prohibition against discrimination contained in the Human Rights Act 1993. No one of these is given any greater status than another.
- Public consultation on human rights issues is not appropriate. As human rights laws are, by nature, designed to protect the less empowered from the more empowered, there is an inherent lack of validity in the process of seeking the views of majority society – especially when it was acknowledged by the Commission that the fundamental public understanding of human rights in New Zealand is limited.

Consequently, it was real concern that, on 9 December 2003, I read the Commission's press release which stated that "the preliminary feedback from the first round of public consultation carried out as part of the development of the New Zealand Action Plan for Human Rights (NZAPHR)" showed that the rights to health, to justice and to an adequate standard of living are "at the top of the list of human rights important to New Zealanders".¹²¹

National Plan of Action: Sector Advisory Groups

This tendency to provide a greater voice for some groups rather than others is further demonstrated by the constitution of the Sector Advisory Groups established by the Commission.

As part of the work towards the NPA, the Human Rights Commission also appointed a National Advisory Council, and three Sector Advisory Groups. The appointed Advisory Groups were the Race Relations Sector Advisory Group, the Disability Sector Advisory Group, and the Children's Rights Sector Advisory Group. My concern was that all of these sectors already had Government funded or well-established community groups which advocate for their needs. Once again, the voices of those groups which are less visible, less able to communicate their issues, become even quieter.¹²²

Other examples of the "public consultation" process

In August 1999, the Ministry of Justice published and distributed a Discussion Paper "Same-Sex Couples and the Law".¹²³

In December 1999, the New Zealand Law Commission submitted its response to this paper to the Ministry of Justice,¹²⁴ and on 28 April 2000, the Human Rights Commission submitted its response.¹²⁵

The Ministry of Justice had stated, in the Discussion Paper, that it was seeking public submissions on "what you think about the way our laws

¹²¹ Human Rights Commission, "First Feedback Points To Key Human Rights", Press Release (9 December 2003).

¹²² The three groups represented by the Sector Advisory Groups have the following agencies / organisations to cater for their needs (non-exhaustive list):

Disabled: Health and Disability Commissioner; Work and Income, and the Ministry of Social Development (Disability Allowance); District Health Boards; Community Care Trusts; Disabled Person's Assembly; CCS; Foundation for the Blind; Deaf Association of New Zealand; Disabilities Resource Centre Trusts; IHC; and others.

Children's Rights: Children's Commissioner; Child Youth and Family; Youthline; various Church-based Social Service Agencies; Community-Based Youth Development Fund (which supports seven youth projects around the country); and others.

Race Relations: Te Puni Kokiri; Ministry of Pacific Island Affairs; Office of Ethnic Affairs; Race Relations Conciliator (Human Rights Commission); Maori Women's Welfare League; Asia 2000; NZ Asia Institute, and others.

¹²³ Ministry of Justice, "Discussion Paper: Same-Sex Couples And The Law", Ministry of Justice (Aug-1999). See more detailed discussion on this in Chapter 7.

¹²⁴ Law Commission, "Recognising Same-Sex Relationships", Study Paper 4 (December 1999),

http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_108_277_SP4.pdf (Retrieved: 09-Dec-1999).

¹²⁵ Human Rights Commission, "Same-Sex Couples And The Law" (28 April 2000).

treat same-sex couples, and whether you think anything should change?”.¹²⁶

Both the New Zealand Law Commission and the Human Rights Commission have avenues for advising Government on matters of law within New Zealand.

The main functions of the Law Commission relate to the systemic review of the laws of New Zealand.¹²⁷ In this case, the submission made to the Ministry of Justice was not a report of the whole Commission, nor was it based on in-depth research. It reflected neither the view of the Law Commission as a whole, nor the views of members of the gay and lesbian communities in New Zealand. It was a Law Commission Study Paper, representing the views of one Commissioner.¹²⁸ There was a danger that the presentation of these views as a Law Commission document is that they could be given undue weight, and be cited as an authoritative statement from the Law Commission with regard to the treatment of same-sex couples.¹²⁹ While the Law Commission study paper does support the recognition of same-sex relationships, it also points in the

¹²⁶ Ministry of Justice, “Same-Sex Couples And The Law”, Discussion Paper, Ministry of Justice (August 1999): 1.

¹²⁷ Law Commission, “Recognising Same-Sex Relationships”, Study Paper 4 (December 1999),
http://www.lawcom.govt.nz/UploadFiles/Publications/Publication_108_277_SP4.pdf
(Retrieved: 9 December 1999).

¹²⁸ The initial few Law Commission Study Papers were papers representing the views of individual Commissioners, not the Commission as a whole. This subsequently changed as it became more common for such papers to be written and views to be expressed which may be seen to reflect on the Commission.

¹²⁹ Law Commission Act 1985:

3. Purpose —

The purpose of this Act is to promote the systematic review, reform, and development of the law of New Zealand.

5. Functions —

(1) The principal functions of the Commission are—

- (a) To take and keep under review in a systematic way the law of New Zealand;
- (b) To make recommendations for the reform and development of the law of New Zealand;
- (c) To advise on the review of any aspect of the law of New Zealand conducted by any Government department or organisation (as defined in section 8(2) of this Act) and on proposals made as a result of the review;
- (d) To advise the Minister of Justice [and the responsible Minister] on ways in which the law of New Zealand can be made as understandable and accessible as is practicable.

direction of registered partnerships legislation:¹³⁰

[t]he political reality is that ninety percent of a loaf is better than no bread at all”.

The issues relating to the Human Rights Commission submission are similar.¹³¹ Under the Human Rights Act 1993 s.5(k), the Human Rights Commission has the function of reporting to the Prime Minister on a range of human rights issues. While in this case, there is every reason to believe that the submission was the considered response of the entire Commission and not the singular response of one Commissioner, and while the Commission is also obliged to promote and protect New Zealand’s human rights standards, I am not convinced that participating in a public consultation / submission with an agency of Government is the most appropriate or most effective way for this to happen.

Summary

It is important that we consider all possible ramifications of consultation on human rights issues. Fundamentally, consultation within a democracy implies that there will be considerable pressure to act upon, or take into account, the majority view. Conversely, human rights is about the protection of minority groups. On what basis can public (majority) consultation on minority rights issues be valid or acceptable?

Non-Governmental Organisations

Non-Governmental Organisations (NGOs) are well-recognised and well-respected entities within the general human rights framework of many jurisdictions. There is, of course, a mixed reception for NGOs. They can be seen by larger, corporate-type organisations as “flies in the ointment”, they can be seen by Government as being stuck in grievance mode and constantly ranting against anything positive or progressive, and they can be seen by members of the public (particularly those who they represent) as saviours.

¹³⁰ Law Commission, “Editorial: Recognising Same-Sex Relationships”, <http://www.lawcom.govt.nz/editorial.html> (Retrieved: 9 December 1999).

¹³¹ Human Rights Commission, “Same-Sex Couples And The Law” (28 April 2000): 12.

Obviously, in the human rights arena, NGOs can play a hugely significant role. Dame Silvia Cartwright, former Governor-General of New Zealand, has described NGOs as the “indefatigable” organisations who have a “vibrancy and raw energy” which assists them in playing a vital role in a range of issues in New Zealand, including human rights matters.¹³²

NGOs tend to be single-issue groups with a narrowly targeted mandate and a very small constituency.¹³³ At the same time, however, the cumulative and collaborative effect can be impressive. Many NGOs are very professional, and the shape or the size or wealth of a specific organisation should not be the way of measuring the worth of NGOs either individually or collectively. “Small organisations can add some real value to the social debate”.¹³⁴

Unfortunately, the role of the NGO can be either:

1. devalued, in which case they, or their ideas, are dismissed on the basis that these groups are not representative; or
2. shunned, on the basis that they are nothing more than annoyances who get in the way of real progress.

In human rights terms, there is nothing to say that lobby groups have to be representative of a view held by a certain number of people. For example, if marriage is a civil right within society generally, and if some same-sex couples wish to marry, then there should be no need to prove that a particular number or percentage of same-sex couples wish to marry before their claim is validated. Thus, it is the role of NGOs to keep the issue alive – and, because of their usual fundamental beliefs and passions, this they are able to do particularly well.

I was particularly encouraged to learn that federal Canadian NGOs can be granted federal Government funding to challenge federal laws which

¹³² Cartwright, Dame Silvia, Governor-General of New Zealand, Speech to the United Nations Association of New Zealand, Wellington, New Zealand (25 May 2001).

¹³³ Marshall, Steve, “The Case Of New Zealand”, in The Role Of Civil Society In Promoting Decent Work: Lessons From Innovative Partnerships In Ireland, New Zealand And South Africa, International Institute for Labour Studies, Geneva (2000).

may be seen by these groups to be in contravention of the Canadian Charter of Rights and Freedoms.¹³⁵ The funding can be substantial, and in looking at the Canadian response to marriage for same-sex couples, can be instrumental in assisting with significant advances. EGALE Canada, an organisation that receives federal funding, has played a huge role in the successes in achieving same-sex marriage in Canada.

Domestic Application Of International Law

It is a recognised principle that no Parliament can bind future Parliaments – the principle of Parliamentary sovereignty. However, human rights laws have become an integral part of the legal climate of New Zealand. Not only has this been recognised within New Zealand, but also New Zealand has been proud of its internationally recognised status as an international leader in the human rights area.

Human rights principles and provisions have become a strong component of the fabric of New Zealand society (in terms of both legislation and practice). It is reasonable, therefore, for persons living in New Zealand to hold every expectation that the New Zealand Government in particular, and Parliament in general, will respect the obligations to which it agreed when ratifying the relevant conventions (in this case, the International Convention on Civil and Political Rights (ICCPR)).

Interestingly, the very reason that the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were drafted separately is that the ICCPR was seen as creating rights which would be immediately enforceable, whereas the ICESCR imposed an obligation to “take steps ... with a view to achieving progressively the full realisation of the rights”.¹³⁶ This is not to hierarchise the importance of the respective covenants, but merely to emphasise the point that

¹³⁴ Marshall, Steve, “The Case of New Zealand”, in The Role Of Civil Society In Promoting Decent Work: Lessons From Innovative Partnerships In Ireland, New Zealand And South Africa, International Institute for Labour Studies, Geneva (2000).

¹³⁵ Conversation with Laurie Arron, (then) Executive Director, EGALE Canada.

Parliaments were aware of the obligations they were accepting at the time of signature and ratification of international human rights treaties.

The notion that individuals in New Zealand can reasonably expect that Parliament will respond actively and positively to the obligations under international law is even more real when it is considered that the New Zealand Parliament has not negated this expectation through any form of legislation. In fact, subsequent to its ratification of various international covenants, Parliament has expressed a commitment to international human rights laws generally and, in the context of this issue, the ICCPR in particular, in legislation and policy and practice.

Legitimate Expectation

The principle of legitimate expectation has come to be recognised in several areas of the law over recent years. Case law has already established that an expectation can arise on the basis of express or implied undertakings to persons affected that other people will act in a particular way. The principle has been discussed and applied in the context of the application of international law standards and provisions in the domestic legal jurisdictions. In the main, this discussion has occurred in the context of administrative decision-making where the provisions of relevant international human rights treaties may give rise to a legitimate expectation that certain matters will be taken into account by Government officials.

In general terms, by the acts of accession to, or ratification of, international human rights instruments a Parliament communicates its implied commitment to the standards provided by those instruments.¹³⁷ By expressly affirming its commitment to those international human

¹³⁶ ICESCR: Art.2(1): Lallah, Justice Rajsoomer, "Developing Human Rights Jurisprudence: The Domestic Application of International Human Rights Norms", at the Judicial Colloquium in Bangalore (24-26 February 1988): 7.

¹³⁷ "Accession: Accession is the usual method by which a State, which has not taken part in the negotiations or signed the Treaty, may subsequently consent to be bound by its terms"; "Ratification: Ratification is an act by which the State expresses its definitive consent to be bound by the treaty. Then, the State Party must respect the provisions of the treaty and must implement it": Council of Europe, 'Glossary on the Treaties', <http://conventions.coe.int/Treaty/EN/v3Glossary.asp> (Retrieved: 12-Aug-2009).

rights instruments in legislation, a Parliament expressly gives notice of its intention to be bound by those international standards. Unless such implied or express commitment is negated in some way, as is the case in Australian law but not in New Zealand law, it can be argued that Parliament has raised in its citizens a legitimate expectation that it and its Governments will act to honour those commitments.

Legitimate expectation in the Australian context

In general terms, fundamental human rights, by their very definition are international and “attach to the human person because of that humanness”.¹³⁸ This implies that, as an overarching principle, any country should respect fundamental human rights. Where any country is a signatory to specific international human rights treaties the obligation to respect those rights must be even more imperative.

It is accepted practice, however, that only the customary elements of international law are automatically incorporated into the domestic law of any country which ratifies international treaties:¹³⁹

Some parts of international law can, as a matter of common law, apply [domestically] without any further action on the part of anyone. ... under common law, customary rules, and particularly principles of human rights, such as the principle against genocide and so on, are part of customary international law.

Other (express) provisions of international treaties are incorporated into domestic law only to the extent expressly provided by domestic legislation:¹⁴⁰

Ratification of the ICCPR as an executive act has no direct legal effect upon domestic law; the rights and obligations contained in the ICCPR are not incorporated into Australian law unless and until specific legislation is passed implementing the provision.

¹³⁸ Kirby, Justice Michael, “The Role Of The Judge In Advancing Human Rights By Reference To International Human Rights Norms”, at the Judicial Colloquium in Bangalore (24-26 February 1988): 71.

¹³⁹ Hon Elizabeth Evatt, former Chief Judge of the Family Court (Australia), Hansard: Parliamentary Debates, SLCRC (16 May 1995).

¹⁴⁰ Dietrich v The Queen (1992) 177 CLR 292: 305.

A Submission of the Attorney-General's Department to the Senate Legal and Constitutional Affairs Committee of the Commonwealth Government of Australia stated that Dietrich illustrates that treaties, particularly those dealing with human rights, can be used:

- to resolve uncertainty or ambiguity in the common law;
- to support review of earlier decisions and then possibly their overtaking; and
- to assist in the determination of community values and standards relevant to the development of the common law.

More recently, however, the High Court of Australia has identified a further indirect effect of treaties on domestic law. In Minister for Immigration and Ethnic Affairs v Teoh, the High Court held (by a majority of 4:1) that ratification of an international convention by the Executive can create a legitimate expectation that the Executive will act in accordance with the convention:¹⁴¹

[R]atification of a convention is a positive statement by the Executive Government of this country to the world and to the Australian people that the Executive Government and its agencies will act in accordance with the Convention. That positive statement is an adequate foundation for a legitimate expectation, absent statutory or executive indications to the contrary, that administrative decision-makers will act in conformity with the Convention ... and treat the best interests of the children as a "primary consideration".

On 10 May 1995, the Australian Minister for Foreign Affairs and the Attorney-General issued a joint statement on the Teoh decision, stating that:

1. the Court in Teoh, by holding that:¹⁴²

merely entering into a treaty could give rise to a legitimate expectation that government decision-makers would make decisions consistently with Australia's obligations under the treaty.

¹⁴¹ Minister for Immigration and Ethnic Affairs v Teoh (1995) 128 ALR 353: 374.

¹⁴² "International Treaties And The High Court Decision In Teoh", a Joint Statement by the Minister for Foreign Affairs (Senator Gareth Evans) and the Attorney-General (Michael Lavarch) (10 May 1995).

had developed a new way in which treaties could affect some administrative decisions;

2. only a small number of treaties could give rise to the sort of expectation the Court had outlined, but the Court had not given guidance on how decision-makers were to determine which treaty provisions were relevant;
3. this created an undesirable uncertainty;
4. the Australian Government would be taking action to restore the position to what it was understood to be before the Teoh case; and
5. the action would be by way of legislation to make clear that:

entering into an international treaty is not reason for raising any expectation that Government decision-makers will act in accordance with the treaty if the relevant provisions of that treaty have not been enacted into domestic Australian law. It is not legitimate, for the purpose of applying Australian law to expect that the provisions of a treaty not incorporated by legislation should be applied by decision-makers.

On 28 June 1995 the Administrative Decisions (Effect of International Instruments) Bill was introduced into the House of Representatives. The key provision of the Bill stated that:

The fact that Australia is bound by, or party to, a particular international instrument, or that an enactment reproduces or refers to a particular international instrument, does not give rise to a legitimate expectation, on the part of any person, that:

- (a) *an administrative decision will be made in conformity with the requirements of that instrument; or*
- (b) *if the decision were to be made contrary to any of those requirements, any person affected by the decision would be given notice and an adequate opportunity to present a case against the taking of such a course.*

In effect, the Government of Australia had overturned the Teoh decision and reverted to the pre-Teoh position whereby treaties could be used to supplement an understanding of domestic law, but their provisions would not be seen as part of Australian domestic law.

Legitimate expectation in the New Zealand context

The situation in New Zealand is somewhat different. The notion that there might legitimately be an expectation that New Zealand will adhere to its agreed obligations under international law is supported in several ways:

- In Tavita v Minister of Immigration,¹⁴³ the New Zealand Court of Appeal found that international treaty obligations might be an implied relevant consideration in administrative decision-making.¹⁴⁴ Tavita was eventually permitted to stay in New Zealand and the immigration policies were reviewed for compliance with New Zealand's international obligations.
- The New Zealand Bill of Rights Act states in its Short Title that it is:

An Act –

To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and

To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.

- The legislation of the sunset clause in the Human Rights Act 1993, and the subsequent work undertaken in relation to “Consistency 2000” and “Compliance 2001” and eventuating in amendments to various legislation by way of the Relationships (Statutory) References Act 2005, serves as further evidence of the New Zealand Parliament's intention to adhere to international human rights standards in the domestic jurisdiction. The sunset clause demonstrates that Parliament intended that Government (and Parliament) would ensure, through the auspices of the Human Rights Commission, that legislation would comply with the HRA (as the domestic manifestation of international human rights standards).¹⁴⁵

¹⁴³ Tavita v Minister of Immigration [1994] 2 NZLR 257. Note that the Court in Tavita did not make a substantive decision in the immigration case, referring the consideration back to the Minister of Immigration for a decision.

¹⁴⁴ In this case, under the United Nations Convention on the Rights of the Child.

¹⁴⁵ Human Rights Act 1993 s.5(1)(i): “To examine, before the 31st day of December 1998, the Acts and regulations that are in force in New Zealand, and any policy or administrative practice of the Government of New Zealand”.

- The Executive Government of New Zealand signed and ratified the ICCPR.
- The Executive Government of New Zealand has not expressly negated its signed intention to “promote universal respect for, and observance of, human rights and freedoms”,¹⁴⁶ and other provisions of the ICCPR.

This would imply that the Executive Government of New Zealand has given, and has affirmed, a commitment to (amongst other provisions):

... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world – The Preamble to the ICCPR.

Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognised in the present Covenant – Article 2.2.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status – Article 26.

It is important to note that the obligations to recognise, respect and promote rights under the ICCPR do not carry with them the same qualifications as do those of the ICESCR. That is, under the ICCPR, Parliament has undertaken to “take the necessary steps ... to give effect to the rights”. Under the ICESCR, Parliament has undertaken to “take

Human Rights Act 1993 s.5(1)(j): “To determine, before the 31st day of December 1998, whether any of the Acts, regulations, policies, and practices examined under paragraph (i) of this subsection conflict with the provisions of Part II of this Act or infringe the spirit or intention of this Act”.

Human Rights Act 1993 s.5(1)(k): “To report to the Minister, before the close of the 31st day of December 1998, the results of the examination carried out under paragraph (i) of this subsection and the details of any determination made under paragraph (j) of this subsection”.

¹⁴⁶ International Covenant on Civil and Political Rights: Preamble.

steps ... to the maximum available resources, with a view to achieving progressively the full realisation of the rights”.

Add to these matters, the facts that New Zealand has:

- a long-standing record of formal involvement in international human rights, having entered into participation with the United Nations in the middle of last century;
- led the world in some human rights matters (for example, being the first nation in the world to grant women the vote in 1893, implementing innovative youth and family legislation in 1989);
- entered into the international arena as a staunch supporter of human rights, commenting on human rights abuses in other countries, and acting in a peace-keeping role under the auspices of the United Nations.

In other words, taking into account all the matters raised above, New Zealand citizens can reasonably expect that, as a good international player, the New Zealand Government and Parliament will generally recognise, respect and promote human rights, and specifically uphold the provisions of international law to which Parliament has acceded. These provisions include obligations to actively pursue legislative measures to promote equality under the law for its citizens, and eliminate discrimination against its citizens.

International promotion of adherence to human rights standards in New Zealand

It is recognised that, as a general rule, States parties are able to choose their method of implementation of international standards within their own territories. However, this general rule has been qualified by the United Nations Human Rights Committee which states:¹⁴⁷

... implementation does not depend solely on constitutional or legislative enactments, which in themselves are often not per se sufficient. The

¹⁴⁷ United Nations Human Rights Committee, “General Comment No.3 – Implementation at the National Level Article 2” (31 July 1981).

Committee considers it necessary to draw the attention of States parties to the fact that the obligation under the Covenant [ICCPR] is not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights.

Specifically in relation to New Zealand, the Committee expressed its:¹⁴⁸

... regret that certain rights guaranteed under the Covenant are not reflected in the Bill of Rights, and that it does not repeal earlier inconsistent legislation, and has no higher status than ordinary legislation. The Committee notes that it is expressly possible, under the terms of the Bill of Rights, to enact legislation contrary to its provisions and regrets that this appears to have been done in a few cases. ... The Committee recommends that the Bill of Rights be revised in order to bring it into full consistency with the provisions of the Covenant and to give the courts the power as soon as possible to strike down or decline to give effect to legislation on the ground of inconsistency with Covenant rights and freedoms as affirmed in the Bill of Rights.

By ratifying the ICCPR and the Option Protocol to the ICCPR, the New Zealand Parliament has accepted a range of obligations in relation to the implementation of human rights in New Zealand. Although New Zealand has moved forward in many respects, there is still obviously a great deal of work still to be done.

Summary

Elements of customary international law can be incorporated into domestic law without any further action by anyone.

Even where a country becomes a signatory to an international treaty such as the ICCPR, the provisions of the treaty are not specifically applicable in that country's domestic law unless those provisions are expressly incorporated into domestic law.

¹⁴⁸ United Nations Human Rights Committee, "Comments on New Zealand, U.N.Doc. CCPR/C/79/Add.47 (1995): Comments in response to 'Human Rights in New Zealand: New Zealand's Third Report to the United Nations Human Rights Committee on Implementation of the International Covenant on Civil and Political Rights'", considered by the Committee on 23 and 24 March 1995.

However, ratification of an international treaty is a positive statement by the Executive Government of a country to the people of that country that the Executive Government of that country will act in accordance with the treaty, and will recognise, respect and promote human rights.

That positive statement is an adequate foundation for a legitimate expectation that administrative decision-makers will act in conformity with the convention unless there are express executive or statutory indications to the contrary.

The international human rights community considers that New Zealand, by acceding to international human rights standards, has accepted an obligation to actively pursue equality for all individuals under its jurisdiction.

The Government and Parliament of New Zealand continue to express its view that New Zealand is a firm believer in the value of adherence to human rights standards, and have negated neither the expectations of New Zealanders nor the expectations of the international communities that New Zealand will comply with its accepted human rights standards – both domestic and international.

Same-sex couples can therefore reasonably expect that the New Zealand Government and Parliament will actively pursue legislative measures which recognise, respect and promote the rights of same-sex couples to full and equal treatment under New Zealand law, free from any discrimination.

Part III

CHRONOLOGY AND ANALYSIS

In this Part, I show that New Zealand, once a leader in rights-based issues, in terms of equal treatment of same-sex couples, now lags behind many other countries. Initially, as Chapter 6 will show, New Zealand demonstrated a commitment to international human rights standards, and in the 1990s legislated for a strong domestic human rights legal framework. In the final analysis, however, as Chapters 8 and 9 will show in the context of same-sex marriage, that New Zealand has fallen behind many other countries in two main respects:

- First, New Zealand still does not offer access to equal marriage rights, while 13 overseas jurisdictions do.
- Second, New Zealand does not permit same-sex couples to apply to adopt children, whereas many overseas jurisdictions provide adoption rights. In many cases, these rights exist even where relationship recognition is by way of registered partnerships rather than marriage.

This Part provides a commentary on, and an analysis of, progress towards equal recognition of same-sex relationships and associated family-related matters in New Zealand and a number of overseas jurisdictions. In doing this I consider the deliberations and outcomes of court cases in these various jurisdictions, and legislative changes which have enhanced or detracted from the provision of equal access to marriage.

Chapter 6 (the period up to 1993) provides an historical background to the laws in New Zealand with regard to gays and lesbians as individuals,

how the notion of family is constructed in New Zealand law, and the introduction of human rights protections. I then look at early developments in Canada, the United States of America, and Denmark, and some introductory information about South Africa. Although this information may start at different times with regard to individual jurisdictions, by the time the reader commences Chapter 7 the information on all relevant jurisdictions will have reached the same point in time. This chapter will also show that, in comparison with the other jurisdictions referred to, New Zealand has a favourable human rights climate for progress on the equal marriage issue.

Chapter 7 (the period from 1994 to 2000) provides information and analysis on the Quilter same-sex marriage case in New Zealand, the reticence of New Zealand Government in making positive change, and same-sex marriage court cases in Canada, and the United States of America.

Chapter 8 (the period from 2001 to 2006) provides information and analysis on the Joslin Communication, and the significant developments in Canada, South Africa and Massachusetts with regard to the provision of equal access to marriage for same-sex couples.

Chapter 9 (the period from 2007 to the present) functions as a 'post-script' only. I do not enter into an in-depth analysis of developments in New Zealand or any of the overseas jurisdictions in this chapter, but rather provide some summary information that the reader may choose to follow up in more detail for their own interest.

Chapter 6

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NEW ZEALAND

Homosexuality and the law in New Zealand

Historical origins

In general terms, the laws inherited by New Zealand from England have perpetuated the ideology upon which they were based – the Canon Law origins of our current legal system. The laws, along with the attitudes inherent in the system which dealt with those laws, grew from the Christian ideals of the time and perpetuated this ideology. This was, of course, no different with regard to the laws relating to sexual behaviour.

The foundation of modern legal attitudes towards sexual behaviour generally, and homosexuality specifically, lies in Christian Roman sources such as imperial legislation. In 390AD, the three Emperors of the time, Theodosius, Valentinian II and Arcadius, promulgated a law which prescribed the death penalty for anal intercourse. This law, it seems, was designed to eliminate male prostitution but appears to have been enforced very rarely.¹ More significantly, the death penalty, for those who participated in “works of lewdness with their own sex”, was incorporated into the ‘Corpus juris civilis’.² Emperor Justinian ordered the development of a collection of various legal documents as part of which the Justinian Code was developed. As Emperor Justinian himself oversaw a raft of legal reforms, a revised version of the Code was promulgated in 534AD. The Code:³

... flatly outlawed same-sex intimacy, placing it in the same category as divorce and adultery - all of which violated the Christian ideal of companionate different-sex marriage.

¹ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 31.

² Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 32. Note, the *Corpus juris civilis* was a collection of fundamental jurisprudential works issued by, or under the order of, the Eastern Roman Emperor, Justinian I, between 529AD and 534AD.

Over time, various Novellae were added to the Code. In 538AD, Emperor Justinian added Novel 77 calling for the repentance of homosexuals and warning that “because of such crimes there are famines, earthquakes, and pestilences”.⁴ From this stemmed the concept of homosexuality causing (and therefore being blameworthy for) things that went wrong in society. This was further reinforced with Emperor Justinian's addition of Novell 141 in 544AD. This Novell arose out of a belief that the plague that devastated Constantinople occurred because God had been provoked by “the multitude of sins in the city”⁵ such as “the defilement of males which some men sacrilegiously and impiously dare to attempt, perpetrating vile acts upon other men”.⁶ Subsequently, Emperor Justinian did not apply the death penalty; in practice offenders were castrated. However, the death penalty remained on the Byzantine law books and was periodically restated.⁷

The ‘Corpus juris civilis’ of sixth century Rome, promulgated by Emperor Justinian, formed the basis of canon law (the law of the Christian Church) and civil law in England and Europe.⁸

In what remained of the Western Empire, the Visigoth state in Spain, same-sex intimacy was criminalised in about 650AD.⁹

It appears that same-sex unions were sanctioned by the Roman Catholic and Greek Orthodox Churches for some years to come. However, the precise nature of the unions is unclear, perhaps because of increasing pressure for these relationships to be hidden or suppressed. What is clear is that the ceremonies for the ‘enfraternising’ of missionaries and clerics were virtually identical to the liturgies which were later to be used by the Church for different-sex marriages.¹⁰

³ Eskridge, William N., Jnr, “A History Of Same-Sex Marriage” in [1993] 79 Virginia Law Review 1419: 1449.

⁴ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 32.

⁵ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 32.

⁶ Novel 141 cited in: Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 32.

⁷ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 33.

⁸ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 32.

⁹ Eskridge, William N., Jnr, “A History of Same-Sex Marriage” in [1993] 79 Virginia Law Review 1419: 1449.

¹⁰ Eskridge, William N., Jnr, “A History of Same-Sex Marriage” in [1993] 79 Virginia Law Review 1419: 1451.

In the intervening period there was a vagueness about the exact nature of the laws of Emperor Justinian. In 1140, Gratian, a Camoldolese monk, put together a collection of canon laws pertaining to sexual prohibitions, and it was at this stage that much ambiguity was enshrined in the laws. Through an unwillingness to describe the sexual activities being outlawed, the canon lawyers of the time used broad terms. Consequently, the term “buggery” was equated with “sodomy”, and “sodomy” was equated with “homosexual activity”. In fact “bouggerie” (“buggery”) was a term originally applied to the heresy of the late-medieval groups known as Bulgars (also known as Albigensians or Cathars) ¹¹ and had no connection to sexual activity. Later the term ‘buggery’ came to be used interchangeably with ‘sodomy’.

During this time, same-sex relationships continued to be sanctioned by the Church, separate from the secular realm, with ceremonies being performed in the Church in the early Middle Ages.¹² Indeed, Boswell maintains that the Church did not begin to celebrate different-sex marriages “at the Church altar” until the thirteenth century.

In the sixteenth century Western Europe became divided into the Catholic and Protestant camps and much of the legislation of the Church became transferred to the State.

England perpetuates the denial of homosexuality

The earliest English secular legislation against homosexual acts dates from 1533 under Henry VIII. Prior to that, laws deriving from Roman Christian law had been incorporated into English Canon law. Henry VIII’s laws classified buggery as a felony, the term “buggery” being used to include same-sex activity like mutual masturbation, anal intercourse, as well as bestiality. The penalty for breach of the laws included death, loss of goods, and loss of lands.¹³ The same statute was renewed by each succeeding Parliament before being made perpetual in 1540. It was from

¹¹ Bullough, V., *Homosexuality: A History*, Meridian Books, New York (1979): 34.

¹² Eskridge, William N., Jnr, “A History of Same-Sex Marriage” in [1993] 79 *Virginia Law Review* 1419: 1453.

the time of these laws that the systematic oppression of homosexuality, and homosexuals, in England began.¹⁴

Legal commentators continued to express their abhorrence of homosexuality. In the seventeenth century, Sir Edward Coke wrote vehemently against homosexuality as well as other forms of “detestable and abominable sins ... not to be named”.¹⁵ In the early 18th century:¹⁶

... persecution aimed at male homosexuals because they were homosexuals, part of the new category of people being created, began on an unprecedented scale. Initially it took the form of raids which resulted in the arrest and prosecution of groups of men frequenting London's 'Molly Houses'. In place of trials of individual “deviants” – the old norm for cases of sodomy – whole groups of men were prosecuted in collective trials in 1699, 1707 and 1726. Convictions resulted in the death penalty. And in the trials it became clear that these men were viewed as sinners who freely and knowingly chose to sin. Homosexuality was beginning to be seen as the activity peculiar to a group of people - homosexuals.

In the 1760s, Blackstone continued the writings about the “crime against nature” and “a crime not fit to be named” in his ‘Commentaries on the Laws of England’.¹⁷ However, it was noticeable that convictions were difficult to achieve without the evidence of a third party (such as in the Molly House cases) because the evidence of a person consenting to a homosexual act announced them as an accomplice and therefore equally guilty of the crime. In spite of these difficulties, the laws remained on the books.¹⁸

¹³ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 34.

¹⁴ In 1541, the Reverend Nicholas Udall, the then Headmaster of Eton was charged with committing buggery. He confessed his guilt, was committed to prison, and dismissed from his Headmastership: Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 34;

In 1631, the Earl of Castlehaven was charged with committing sodomy with one of his servants as well as raping his own wife and sodomising her. The charges were brought by his son, who was fearful that his father's lover would receive part of his father's estate. The Earl was found guilty and was executed: Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 35.

¹⁵ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 35.

¹⁶ Workers' Power (Britain), Lesbian and Gay Liberation: A Trotskyist Strategy (Workers' Power (Britain), London, 1991): 10.

¹⁷ Written between 1765 and 1769: Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 36.

¹⁸ Bullough, V., Homosexuality: A History, Meridian Books, New York (1979): 37.

In Britain homosexual acts between males remained punishable by death until 1861. But there was a change in the law in that year to make those involved in such activities liable merely to prison sentences.¹⁹

It is ironic to note that “the first major change in the English laws relating to homosexuality came not from any deep philosophical commitment, however, but simply through accident”.²⁰ In 1885, the English Parliament passed a series of laws, proposed by a Liberal MP, Henry Labouchere, designed to eliminate child prostitution. In draft, the legislation related only to sexual acts with girls. A last minute amendment was added, purportedly intended to include, in the legislation, sexual acts by men with boys. The legislation now provided that:²¹

Any male person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be guilty of a misdemeanour, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year with or without hard labour.

The effect of the amendment was to punish acts between consenting adult males (though not females), even if those acts took place in private. By this Act, sexual acts between adult males were criminalised for the first time in English law. This was also the first time that the concept of homosexuality was specifically separated out from the concept of sodomy.

Although Labouchere claimed to have had only minors in mind, it is unclear whether the amendment was as lacking in deliberacy as may first appear to be the case. Victorian English attitudes were such that sexual behaviour was seen to be a male domain. Thus laws regulating “deviant” sexual behaviour pertained to males only. Queen Victoria herself is quoted as commenting that ‘women did not partake in sexual activity, only men’, and that such activity was the “shadow-side of

¹⁹ Offences Against the Person Act 1861.

²⁰ Bullough, V., *Homosexuality: A History*, Meridian Books, New York (1979): 39-40.

²¹ Bullough, V., *Homosexuality: A History*, Meridian Books, New York (1979): 40.

marriage”.²² The result was that, at the time male homosexuality was criminalised, lesbianism was not.

There have been two main effects stemming from all of the above. First, there has long been, and continues to be, a confusion regarding the laws against sodomy and the laws against homosexuality with the two often being equated. They were not, and are not, the same. The second effect was that anti-homosexual legislation in Britain was consolidated.

As a result, male homosexuality has historically been seen by, and reflected in, the law as a criminal deviance from the sexual norms of society. It is for this reason that aspects of the life of the gay male have been dealt with either negatively or, at best, repressively.

The conservative interpretation based in a Western Christian heritage has condemned homosexuality and homosexual relationships to, at best, a lesser level of recognition and acknowledgement than heterosexuality and heterosexual relationships and, at worst, to criminalisation and therefore, often, invisibility or hatred. Laws have therefore legitimated and perpetuated this condemnatory approach.

The law and homosexuality in New Zealand

Homosexuality, as a personal characteristic, has never been illegal in New Zealand for men or for women – that is, it has never been illegal to be homosexual. However, all homosexual behaviour between consenting adult males was made a criminal behaviour by the New Zealand Criminal Code Act 1893. As in England, lesbian sexual behaviour has never been classed as criminal behaviour.

The New Zealand House of Representatives criminalised anal intercourse in the Offences Against the Person Act 1867 under the Part heading within the Act of “Unnatural Offences”. The 1867 Act followed the English reform of 1861 and mandated a sentence of life imprisonment rather

²² Pearsall, R., *Public Purity, Private Shame: Victorian Sexual Hypocrisy Exposed*, Weiderfield & Nicholson, London (1976): 37.

than death, as had been the prescribed sentence in England up to this time.²³

Sodomy and bestiality – Whosoever shall be convicted of the abominable crime of buggery committed either with mankind or any animal shall be liable at the discretion of the Court to be kept in penal servitude for life or for any term not less than ten years.

The 1867 New Zealand legislation also provided for penalties of between three and ten years for any attempt to commit “an infamous crime” – attempted buggery, assault with intent to commit buggery, or indecent assault upon a male:²⁴

Attempt to commit an infamous crime – Whosoever shall attempt to commit the said abominable crime or shall be guilty of any assault with intent to commit the same or of any indecent assault upon any male person shall be liable at the discretion of the Court to be kept in penal servitude for any term not exceeding ten years and not less than three years or to be imprisoned for any term not exceeding two years with or without hard labour.

English law was amended in 1885 to ensure specific criminalisation of all sexual activity between males. This included oral sex and mutual masturbation, as well as anal intercourse. New Zealand attempted to make a similar amendment through its Crimes Bill of 1888. The attempt failed.

However, New Zealand did continue to treat buggery as a ‘crime against morality’ within the Criminal Code Act 1893 s.136:²⁵

Everyone is liable to imprisonment with hard labour for life, and, according to his age, to be flogged or whipped once, twice or thrice, who commits buggery either with a human being or with any other living creature.

²³ Offences Against the Person Act 1867 s.58.

²⁴ Offences Against the Person Act 1867 s.59.

²⁵ Criminal Code Act 1893 s.136. Note: The ‘shoulder’ of the printed Act provides that this provision relates to an “Unnatural offence”.

The 1893 Act also provided, in s.137 that:²⁶

Every one is liable to ten years' imprisonment with hard labour, and, according to his age, to be flogged or whipped once, twice, or thrice, who –

- (1) Attempts to commit buggery; or*
- (2) Assaults any person with intent to commit buggery; or*
- (3) Who being a male indecently assaults any other male.*

It shall be no defence to an indictment for an indecent assault on a male of any age that he consented to the act of indecency.

Up to this point, the laws relating to “unnatural offences” (the ‘buggery’ laws) had been gender-neutral. Section 137 of the 1893 Act, for the first time, made express reference to male-to-male sexual activity, and prescribed such to be criminal activity. Only men could be charged with an indecent assault; the possibility of female-to-female sexual activity was a legal non-issue.

In 1941, the penalty of flogging was repealed (although the penalty of life imprisonment remained in place until 1961),²⁷ and the requirement for hard labour was repealed in 1954.²⁸ Following the implementation of the Crimes Act 1961, “indecent assault on man or boy” carried a maximum penalty of five years imprisonment, and sodomy seven years. It is said that such offences were “taken seriously” until the 1980s, with numerous convictions for adult homosexual activity.²⁹

Through the 1960s and 1970s, social attitudes were generally changing. Historically, New Zealand had held itself out to be, and had been seen widely as, a leader in liberal reform in many social areas.³⁰ It was not

²⁶ Criminal Code Act 1893 s.137. Note: The ‘shoulder’ of the printed Act provides that these provisions relate to any “Attempt to commit unnatural offence”.

²⁷ Crimes Amendment Act 1941 s.3(1).

²⁸ Criminal Justice Act 1954 s.54(1).

²⁹ Greg Newbold, *Crime and Deviance*, Oxford University Press, Auckland (1992): 68: (50 convictions and 14 prison sentences in 1973).

³⁰ For example, on 19 September 1893, New Zealand was the first country in the world to introduce the vote for women (Electoral Act 1893) and, in 1898 was the first country in the world to introduce a universal superannuation for persons over the age of 65 years (Old Age Pensions Act 1898). New Zealand has also been seen as a world leader in domestic race relations and in the international human rights arena.

extraordinary, therefore, when in 1967, Parliament was petitioned to decriminalise homosexual activity. The petition was unsuccessful,³¹ however, there were soon to be further attempts.

In 1974, Venn Young (National Party MP for Waitotara) introduced a Crimes Amendment Bill. This Bill proposed a decriminalisation of sexual activity between consensual adult males with an age of consent of 21 years (the age of consent for heterosexuals being 16 years). This Bill was opposed, on the one hand, by those who described homosexuality as an “unnatural habit”³² or who considered that by decriminalising homosexuality, Parliament would be “seen to condone or accept homosexuality”.³³ On the other hand, the Bill was opposed by those who supported decriminalisation but did not support an unequal age of consent. In July 1975, the Bill was reported back to the House with the age of consent reduced from 21 to 20. However, the Bill was defeated in its Third Reading by 34 votes to 29 (23 abstentions).³⁴

In 1979, Warren Freer (Labour MP for Mt Albert) proposed a further Crimes Amendment Bill to decriminalise homosexuality with an age of consent of 20 years. The Bill did not receive widespread support and was later abandoned before being introduced to the House.³⁵

Alongside the proposals for decriminalisation, there had also been a proposal to include sexual orientation as a prohibited ground of discrimination in the Human Rights Commission Act 1977. Parliament never got to vote on this proposal either. MPs were lobbied by gay activists, but the proposal failed as a result of insufficient support for its inclusion.³⁶

Even though these reform proposals were unsuccessful, social change was evident. One of the noticeable changes was that, commencing in

³¹ Greg Newbold, *Crime and Deviance*, Oxford University Press, Auckland (1992): 69.

³² Hon Michael Connelly, *Hansard: Parliamentary Debates*, 1974, 392: 3167.

³³ Bill Birch (National Party MP for Franklin), NZPD, 1975, 399: 2821.

³⁴ Hugh Young, “A Chronicle of Homosexuality in New Zealand: Part 2” at <http://www.gaynz.net.nz/history/Part2.html> (Retrieved: 21 July 2009).

³⁵ Guy, Laurie, *Worlds In Collision: The Gay Debate In New Zealand, 1960-1986*, Victoria Press, Wellington (2002): 113.

about 1970, there was an increase in the number of gay groups, organisations and events not only in the main centres of New Zealand but also in the regional centres.³⁷ The main significance of these organisations and the events in which they held is that for the first time in the history of New Zealand, there was beginning to be a co-ordinated voice for gay and lesbian issues and concerns. The invisibilisation of gays and lesbians was beginning to come to an end as gays and lesbians refused to remain silent. This was especially challenging for gay men – it meant not just publicly declaring oneself to be a member of a socially stigmatised group, it meant openly declaring oneself to be someone who participated in a criminalised activity within New Zealand society.³⁸

There were increasing examples of the gay and lesbian voice responding to homophobic expression.

At 9:00pm on 1 February 1980, the Police raided the “Westside” Sauna and “Out!” magazine in Auckland, interviewed 30 men, and then arrested and charged 8 of them. Then, on 8 February 1980, 600 people participated in a march to protest at the Police raids.³⁹ The establishment of the Auckland Gay Task Force was a direct response to the Police raid of the “Westside” Sauna.

When, in September 1980, the Chief Human Rights Commissioner supported the rejection of the National Gay Rights Coalition’s call for decriminalisation and an equal age of consent, stating that in some circumstances discrimination is justified, the response was a picket of the Human Rights Commission offices in Wellington and Auckland.⁴⁰ This was followed by the organised defacing of the March 1981 Census forms by writing across them “No rights – no responsibilities”.⁴¹

³⁶ Guy, Laurie, *Worlds In Collision: The Gay Debate In New Zealand, 1960-1986*, Victoria Press, Wellington (2002): Note 93 to Chapter 4 (see p.264-265).

³⁷ For a complete list see: <http://www.gaynz.net.nz/history/Chronolheads.html#direct> (Retrieved: 10 May 2009).

³⁸ Remembering that no person was a criminal by virtue of being gay, but only by virtue of participating in “indecentcies between males” – homosexual activity.

³⁹ Hugh Young, “A Chronicle of Homosexuality in New Zealand: Part 3” at <http://www.gaynz.net.nz/history/Part3.html> (Retrieved: 21 July 2009).

⁴⁰ Hugh Young, “A Chronicle of Homosexuality in New Zealand: Part 3” at <http://www.gaynz.net.nz/history/Part3.html> (Retrieved: 21 July 2009).

⁴¹ Hugh Young, “A Chronicle of Homosexuality in New Zealand: Part 3” at <http://www.gaynz.net.nz/history/Part3.html> (Retrieved: 21 July 2009).

Gays and lesbians had begun to bring to notice the nature and extent of the inequalities in treatment which impacted on them in many facets of their everyday lives. They began to gain support from a range of quarters, and public reaction towards them became less negative and less actively aggressive. That is not to say that society at large was accepting or supportive of gay rights – only that, officially, less effort was being put into condemning them.

Criminal prosecutions continued but lessened, and by the 1980s were “almost non-existent”.⁴²

Homosexuality was no longer seen, except by an insignificant minority, as a disease or a psychopathic disorder.⁴³ It was now being seen as a difference in sexual identity, as part of a range of sexual norms.

On 8 March 1985, the Homosexual Law Reform Bill was introduced into Parliament.⁴⁴ The Bill, introduced and sponsored by Fran Wilde MP, sought the reform of the criminal law relating to homosexual behaviour and the introduction of protections for gay men and lesbian women against discrimination on the basis of their sexual orientation. As a result of this Bill, the preceding actions of the gay and lesbian communities, and the energy and commitment of Ms Wilde, homosexual activity was decriminalised in a Parliamentary conscience vote in July 1986 – 49 votes in favour, 44 votes against – with an equal age of consent of 16 years.⁴⁵ The anti-discrimination provisions accompanying the Bill were not enacted.

⁴² Greg Newbold, *Crime and Deviance*, Oxford University Press, Auckland (1992): 69.

⁴³ “The American Psychological Association supports the action taken on 15 December 1973, by the American Psychiatric Association, removing homosexuality from that Association's official list of mental disorders. The American Psychological Association therefore adopts the following resolution: Homosexuality per se implies no impairment in judgement, stability, reliability, or general social and vocational capabilities; Further, the American Psychological Association urges all mental health professionals to take the lead in removing the stigma of mental illness that has long been associated with homosexual orientations”, from Conger, J.J., “Proceedings of the American Psychological Association, Incorporated, for the year 1974: Minutes of the Annual Meeting of the Council of Representatives”, in (1975) 30 *American Psychologist* 620.

⁴⁴ Guy, Laurie, *Worlds In Collision: The Gay Debate In New Zealand, 1960-1986*, Victoria Press, Wellington (2002): 194.

⁴⁵ Guy, Laurie, *Worlds In Collision: The Gay Debate In New Zealand, 1960-1986*, Victoria Press, Wellington (2002): 218.

During the 1970s and 1980s, the New Zealand Parliament had also ratified international human rights conventions such as the International Covenant on Civil and Political Rights (ICCPR).⁴⁶ In so doing, New Zealand accepted “a responsibility to strive for the promotion and observance of the rights recognized in the present Covenant”.⁴⁷ New Zealand also acceded to the Optional Protocol to the Covenant,⁴⁸ meaning that the New Zealand Parliament had accepted the scrutiny of the United Nations Human Rights Committee into the treatment of individuals within the domestic New Zealand jurisdiction, including under Acts of Parliament.

Like many other jurisdictions, the focus up to this point had been on the statutory rights of individuals with an emphasis on liberalising the law relating to homosexuality and the associated treatment of homosexual persons as individuals within society. In other words, drawing once more on the analogy to Maslow’s hierarchy, the focus had been on effective change at the most fundamental level, rather than attempting, in any real way, to address the higher-level issues such as prohibitions against discrimination.⁴⁹ While the Homosexual Law Reform Bill had originally included anti-discrimination provisions, these had been ‘let go’ with a focus on securing decriminalisation. However, the first hurdle had been overcome, and this set the platform for the debate on protections against discrimination to continue at a later time.⁵⁰

The concept of family in New Zealand law

Judge Inglis in his treatise on family law states that:⁵¹

... it is clear that the development of Family Law in New Zealand has had its origins and its impetus in the belief that the stability and security of family

⁴⁶ The International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, and entered into force on 23 March 1976. New Zealand ratified the ICCPR on 28 December 1978.

⁴⁷ International Covenant on Civil and Political Rights: Preamble.

⁴⁸ New Zealand acceded to the Optional Protocol on 26 May 1989.

⁴⁹ See discussion on this in Chapter 3.

⁵⁰ See discussion on this in Chapter 6.

means the stability and security of society. As is the case in all social legislation, the legislature has never been slow to point out where family duties lie and to regulate family politics in a manner which it has considered best calculated to promote the general social interest.

However, despite the presumed link between marriage and the constitution of a family, there is no express definition of “family” in New Zealand law. The actual definition can only be implied from a variety of sources including family law related statutes, case-law, Governmental administrative procedures, and various commentaries and social practices.

English origins

The current predominating legal concept of the nuclear family was brought to New Zealand with the (mainly English) settlers of the mid-1800s. The family, in England, had become an established institution based around defined economic, psychological, domestic and social roles.⁵²

Economically, the family became a unit of production or earning power. In the former, production was important either directly for the family itself, or for bartering with other families. In the latter, wage-labour became important to enable families to increase their buying power. The family unit also ensured the production of a new generation to carry the family property, business and name. In England and in New Zealand, this patriarchal model generally meant that the oldest son would carry on the father's business, inherit the father's property, and inherit the father's name, as the family was very much the unit belonging to the father. This patriarchal concept suited the power-holders in society in that such a structured system meant stability and security by virtue of lines of control and predictability.

⁵¹ Inglis, B.D., Family Law, Sweet and Maxwell (NZ) Ltd, Wellington (1960): 13.

⁵² The categorisations which follow are modified from: Parker, Stephen, The Marriage Act 1753: A Case Study In Family Law-Making, Oxford University Press (1987): 138-140.

Psychologically, the family provided a private haven for the husband away from the rigours of the public sphere. It allowed for the bond between husband and wife, and between children and parents. This created a sense of belonging for all, and in that way was also beneficial to society.

Domestically, the requirements dictated by the patriarchal society, were catered for, with the breadwinner free to make the vital contact with the public world, safe in the knowledge that on the home front all was being seen to and that a comfortable home, a good supply of clothing, food, warmth would be provided for on his return. The family also provided the 'mechanisms' by which children could be produced and nurtured in order to satisfy the husband's needs for heirs and successors.

Socially, the family also ensured predictability within these clearly defined roles and a structure within which children would gain the knowledge perceived as necessary to function as valuable members of society. That is, through the family unit the children would absorb the culture and behaviours of their society and thereby perpetuate those values.

It is this concept of family that came to New Zealand by virtue of the social, legal and religious imperatives carried from England before, during, and as a result of, the settler period. This was in spite of the quite contrary cultural notions of family which were apparent amongst the indigenous peoples of New Zealand and the fact that significant numbers of immigrant settlers coming to New Zealand were young single men. Of course, there were commonly acceptable exceptions to the nuclear family structure but, in general, it was taken for granted that young boys would grow up and marry young women, and young girls would grow up and marry young men. These couples would move in to their own home and raise children to carry the family name and to receive the family property.

Thus, the nuclear family was established as the standard unit of social organisation in New Zealand and secured by virtue of the formalisation of the institution of marriage by Lord Hardwicke's Marriage Act 1753 (UK).

Lord Hardwicke's Act is significant in that it marked clearly the beginning of the civil state's intervention into the family and reflected a "growing desire for certainty in legal relations within civil society",⁵³ and led to the development of a New Zealand family law.

The narrow notion of a nuclear family suited the goals and needs of the dominant power group. The wider definition of family (such as the extended family) was not an unknown concept but, once established, the nuclear family became accepted as that which best suits Western society generally.

The reality of the non-nuclear family

The nuclear family is a social and cultural anathema to various groups within New Zealand society.

This is perhaps most clearly demonstrable in relation to Māori social and cultural family values and practices.

For Māori, the family is the hapū – the extended family. Traditionally, Māori children view their parents and their uncles and aunts collectively as mātua. Their relationships with their cousins and whāngai brothers and sisters were seen in relation to the status of the respective mātua with some cousins being seen as tuakana, and others as teina. Children are the mokopuna of all their koroua and kuia, and they are supported by all their koroua and kuia. In turn, as the children grow up they would support their ageing kaumātua.⁵⁴

In the nuclear family, grandparents, aunts and uncles are generally not intimately involved in decision-making issues such as adoption, custody, guardianship, access, education and healthcare, in relation to the

⁵³ Parker, Stephen, The Marriage Act 1753: A Case Study in Family Law-Making, Oxford University Press (1987): 149.

⁵⁴ Mātua – parents and all those caregivers of that generation; whāngai brothers and sisters – brothers and sisters adopted in accordance with tikanga Māori, Māori customary adoption; tuakana – older sibling; teina – younger sibling; mokopuna – grandchild(ren), grand nephew(s) and niece(s), and children of subsequent generations; koroua – grandfather(s) and grand uncle(s); kuia – grandmother(s) and grand aunt(s); kaumātua – elders, grandparents, grand uncles and aunts.

children in those families. However, in the extended family, grandparents, aunts and uncles generally do participate directly in matters relating to the everyday and the long-term care of the children of the family.

Aside from Māori, where the extended family is the socially and culturally accepted norm, many other families do, in way or another, live as an extended family, and do not adhere strictly to the nuclear family straitjacket. I was brought up, for example, with a great deal of regular contact with my aunts and uncles, my cousins, and my grandparents. While we did not all live in the same house, we were very much a family on a great number of occasions.

I am aware that there are many other cultures within New Zealand for whom the extended family is also the norm. Asian families, for example, generally have very strong inter-generational relationships, with grandparents and even great-grandparents being very much members of the family, living with the family. This could also be said of many other groups present within New Zealand.

In terms of gay and lesbian family structures, prior to realising or coming to terms with their own sexuality, some gay men and lesbian women might enter into relationships with a partner of the opposite gender. There might be children resulting from these relationships. A number of gay men and lesbian women will, therefore, enter a same-sex relationship bringing with them children from a previous relationship. In this situation, the couple view themselves as a family but often the law does not. Alternatively, a same-sex couple may have a child or children of their own. There are increasing instances of artificial insemination, surrogacy, or adoption (whether formal or informal) through which same-sex couples are becoming parents.

The family in New Zealand policy

The traditional nuclear family model, defined almost exclusively in terms of marriage, is now a statistical minority. Even though there are many for

whom the myth of the “mother, father and 2.3 children” nuclear family does not accord with their personal reality, the nuclear family is still seen by the State as the norm, and it is this family structure which provides the basis for much Government policy. Historically, and to a large extent even now, other types of family tend to be defined with reference to that benchmark, and Government policy has been based on ‘massaging’ families into the nuclear family shape.⁵⁵

In other words, “different” other family types are judged on the basis of how much they are consistent with the dominant view of family, and are construed as acceptable to the extent that they replicate that dominant type. At the same time, they are deemed to be inferior and unacceptable to the extent that they are inconsistent with the dominant type and do not replicate it. Families based around relationships other than heterosexual marriage relationships tend to be defined in terms of the latter relationship, and are seen as deviations from the marriage-based family. For example:

- de facto relationships are described as unions like, or in the nature of, marriage;
- same-sex relationships are described variously as same-sex relationships, de facto relationship, relationships in the nature of marriage;⁵⁶
- single parent families are defined in contrast to married couple families;
- step families are defined in terms of the relationship between the parents (and possibly the children of those parents’ prior relationships), and in terms of making up reconstituted families.

⁵⁵ See further discussion on this point and supporting statistical information in the next section in this chapter.

⁵⁶ For example, the Domestic Violence Act 1995 s.3 includes same-sex partners “living in a relationship in the nature of marriage”, and the proposed Property (Relationships) Bill 2000, currently before a Parliamentary Select Committee uses this same terminology. This is by no means universal, however, and same-sex couples are still excluded from most relationship and family-related laws.

Family as a nuclear, patriarchal, heterosexual unit

Statistics New Zealand states that:⁵⁷

The family is the most basic unit of organisation in New Zealand society. Its fundamental roles include care-giving and socialising family members, in addition to supporting those who are dependent on others. Most government social policy is administered on the basis of the family unit and families also provide a vital indicator of child welfare.

It is worth considering whether or not the “reasonable man” perspective of what constitutes family accords with the reality of the family structures and types that actually exist in New Zealand. As O’Donovan has stated:⁵⁸

... the word “family” has many meanings and many contexts ... people have different experiences of families. For some, these will be validated by law. For others, their experiences are ignored or stigmatised ... law privileges certain forms and denies recognition and benefits to others, while simultaneously denying that a coherent definition exists.

In general terms, Statistics New Zealand views family as either, or both of:

- a **horizontal** adult-adult relationship; or
- a **vertical** adult-child relationship.⁵⁹

However, census data shows that the presumed standard nuclear family of Mum, Dad and children is in a distinct minority. New Zealand families are, in reality, constituted as follows:⁶⁰

- two adults with children – 42.1% (decrease from 48.0% in 1991)
- one adult with children – 18.9%% (increase from 17.2% in 1991)
- two adults with no children – 39.0% (increase from 34.8% in 1991)

⁵⁷ Statistics New Zealand, New Zealand Now: Families, Statistics New Zealand, Wellington (1994): 1.

⁵⁸ O’Donovan, K., Family Law Matters, Pluto Press, London (1993): 38.

⁵⁹ Statistics New Zealand, Families And Households: New Zealand Census Of Households And Dwellings 2001, Statistics New Zealand, Wellington (December 2002): 11.

⁶⁰ Statistics New Zealand, Families And Households: New Zealand Census Of Households And Dwellings 2001, Statistics New Zealand, Wellington (December 2002): 11.

The traditional ideal of the nuclear family is eroded even further if one examines the number of families which consist of Mum, Dad and children where Dad is the sole breadwinner. In relation to two-parent families with children (the 42.1% above), the statistics are as follows:⁶¹

- Mothers working full-time – 36.8% (up from 31.4% in 1991)
- Mothers working part-time – 30.9% (up from 26.9% in 1991)
- Mother working (total) – 67.7% (up from 58.3 in 1991)

What the census data shows, therefore, is that 15.5% of two-parent families with male and female partners fit the traditional model of father employed full-time and mother not in the labour force.⁶²

Human Rights legislation in New Zealand

New Zealand does not have a constitution in the same way that we see in many other countries.

- New Zealand does not have a single-document Constitution.
- New Zealand does not have an entrenched Constitution.
- New Zealand does not have a supreme Constitution.

Over time, a number of documents have come to be seen as comprising New Zealand's multi-document Constitution. Some of the component documents are human rights statutes while others are statutes that provide for wider purposes but are rights-related.

Some of the documents considered to be part of New Zealand's Constitution originate from well before the advent of modern

⁶¹ Statistics New Zealand, Families And Households: New Zealand Census Of Households And Dwellings 2001, Statistics New Zealand, Wellington (December 2002): 12.

⁶² Statistics New Zealand, New Zealand Now: Families And Households, Statistics New Zealand, Wellington (1998): 13; an 11.5 percent drop since 1986.

international human rights – for example, the Magna Carta,⁶³ and the New Zealand Constitution Act 1852,⁶⁴ and the Maori Representation Act 1867,⁶⁵ amongst others. Some are more recent – for example, the Ombudsman Act 1975, the Constitution Act 1986, the Electoral Act 1993,⁶⁶ the New Zealand Bill of Rights Act 1990, and the Human Rights Act 1993.

In direct form, the presence of human rights laws within the New Zealand legal context began, in theory, when New Zealand voted for the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. This was New Zealand's first in a series of international human rights commitments.

The first domestic legislation specifically dealing with the right not to be discriminated against was the Race Relations Act 1971. This was followed by the Human Rights Commission Act 1977. These were to be followed by the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

The two key human rights statutes in New Zealand, which explicitly provide for protections against discrimination, are the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. However, even though these two statutes are key components of the New Zealand Constitution, both are ordinary statutes and do not enjoy any elevated status.

The New Zealand Bill of Rights Act 1990 67

The New Zealand Bill of Rights Act 1990 was given Royal assent on 28 August 1990 and came into effect on 25 September 1990,⁶⁸ and has several key functions.

⁶³ During the reign of Edward 1: “We well sell to no man, we will not deny nor defer to any man, either justice or right”: in Coburn v Human Rights Commission [1994] 2 NZLR 257: submissions of Counsel for the Respondent: 28.

⁶⁴ Which established internal self-government for the New Zealand Colony.

⁶⁵ Which allowed for four Maori Members of Parliament.

⁶⁶ And, formerly, its predecessors such as the Electoral Act 1952.

⁶⁷ Also, see earlier discussion relating to the New Zealand Bill of Rights Act 1990 in “Strengthening the status and role of our human rights legislation” in Chapter 5.

⁶⁸ The New Zealand Bill of Rights Act 1990 s.1(2) provides: “This Act shall come into force on the 28th day after the date on which it receives the Royal assent”.

First, it provides a legislative affirmation of New Zealand's commitment to human rights standards:⁶⁹

An Act -

- (a) To affirm, protect, and promote human rights and fundamental freedoms in New Zealand; and*
- (b) To affirm New Zealand's commitment to the International Covenant on Civil and Political Rights.*

Second, in contrast to the Human Rights Commission Act 1977 (and the later Human Rights Act 1993), the New Zealand Bill of Rights Act 1990 regulates the relationship between the individual and Government rather than the relationships amongst individuals. Section 3 of the NZBORA provides that the Act:

applies only to acts done –

- (a) by the legislative, executive or judicial branches of the government of New Zealand; or*
- (b) by any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.*

Third, it provides for the protection of certain express rights,⁷⁰ including:

- life and liberty of the person;
- democratic and civil rights;
- non-discrimination and minority rights; and
- rights associated with search, arrest and detention.

It is s.19(1) of the New Zealand Bill of Rights Act 1990 that prescribes the grounds of protection against discrimination. When the New Zealand Bill of Rights Act 1990 came into effect, there were 6 grounds of prohibition included in that provision – colour, race, ethnic or national origins, sex, marital status, or religious or ethical belief.

⁶⁹ The New Zealand Bill of Rights Act 1990 Long Title.

⁷⁰ The New Zealand Bill of Rights Act 1990 Part II.

The Human Rights Act 1993, when it was passed, included a consequential amendment to the New Zealand Bill of Rights Act 1990 that resulted in s.19(1) being amended to read:⁷¹

19. Freedom from Discrimination –

(1) Everyone has the right to freedom from discrimination on the grounds of the Human Rights Act 1993.

The grounds of the Human Rights Act 1993 include: sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status, and sexual orientation.

Provisions regulating how the New Zealand Bill of Rights Act 1990 was to be applied were contained within Part I and included, of particular relevance to the discussion on same-sex marriage, the following key provisions.

The interaction of the New Zealand Bill of Rights Act 1990 ss.4 and 6 is somewhat complex.⁷² Cooke P, as President of the Court of Appeal, affirmed his “willingness to impose greater obligations on the executive to protect rights than the immediate legislation required”.⁷³ He stated that:⁷⁴

...[t]he rights and freedoms in Part II are not constitutionally entrenched and may be overridden by an ordinary enactment, but in interpreting an enactment a consistent meaning (to the Bill of Rights) is to be preferred to any other meaning.

Section 4 provides:

4. Other enactments not affected –

No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), --

(a) Hold any provision of the enactment to be impliedly repealed or

⁷¹ This section was substituted, as from 1 February 1994, by Human Rights Act 1993 s.145.

⁷² For an in-depth analysis of each of the provisions and the tensions between them, refer to Chapter 7 of: Butler, Andrew, and Butler, Petra, The New Zealand Bill of Rights Act: A Commentary, LexisNexis, Wellington (2005): 157.

⁷³ Coburn v Human Rights Commission [1994] 2 NZLR 257: submissions of Counsel for the Respondent: 26.

⁷⁴ MOT v Noort [1992] 3 NZLR 260, at 272: cited in Coburn v Human Rights Commission [1994] 2 NZLR 257: submissions of the Counsel for the Respondent: 26.

revoked, or to be in any way invalid or ineffective; or

(b) Decline to apply any provision of the enactment –

by reason only that the provision is inconsistent with any provision of this Bill of Rights.

The fact that the New Zealand Bill of Rights Act 1990, as the result of a conscious decision-making process, was not enacted as supreme legislation means that it was not intended that courts be able to ‘strike down’ legislation that was inconsistent with it. One of the key purposes of this provision, therefore, was to remove any doubt that may arise with regard to the potential for the New Zealand Bill of Rights Act 1990 to over-ride other legislation:⁷⁵

Parliament (through s.4 of BORA) effectively took away the tolls by which precedence could be accorded to the BORA over inconsistent statutes in the case of an irreconcilable conflict.

The New Zealand Bill of Rights Act 1990 s.6, on the other hand, provides:

6. Interpretation consistent with Bill of Rights to be preferred –

Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

The potential conflict that rests in this provision as compared with s.4 is that:

- on the one hand, s.4 provides that the wording of a statute prevails even where it may be considered to be inconsistent with the New Zealand Bill of Rights Act 1990; whereas
- on the other hand, s.6 provides that where the language of a statutory provision enables an interpretation that is consistent with the New Zealand Bill of Rights Act 1990, that consistent interpretation is to be preferred.

In the New Zealand same-sex marriage case, the Appellants submitted that s.4 required the Court to ‘strive’ to interpret the Marriage Act 1955 consistently with the New Zealand Bill of Rights Act 1990. The Court

responded by stating that this was only the case where such consistency could be attained through an interpretation based in the natural meaning of the language of the relevant provision(s); it does not require the court to strain the language or intent of the legislation at issue.⁷⁶

I agree that where a breach of a fundamental right or freedom enshrined in the Bill of Rights is found to exist in any statute the Court should conscientiously strive to arrive at a meaning which will avoid that breach. ... Even adopting this approach in the present case, however, I am unable to interpret the Marriage Act in the manner sought by the appellants. ... This Court has an interpretative role and while it must, in accordance with Parliament's direction prefer a meaning to any statutory provision which is consistent with the Bill of Rights, it cannot adopt a meaning which is clearly contrary to Parliament's intent.

Section 5 of the New Zealand Bill of Rights Act 1990 is the key provision relating to the assessment of different treatment and whether that different treatment constitutes discrimination or is lawfully justifiable. Section 5 provides:

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Essentially, this section provides that once different treatment (prima facie discrimination) has been identified, then it may only be justified, and therefore not be substantively discriminatory, by reference to the “justified limitations” test of s.5. In summary,⁷⁷ a person claiming discrimination must show that:

- they have been subject to different treatment; and
- the different treatment is less favourable than that of other comparable groups; and
- the less favourable, different treatment has resulted in a detriment; and
- the different treatment is not justifiable.

⁷⁵ Butler, Andrew, and Butler, Petra, The New Zealand Bill of Rights Act: A Commentary, LexisNexis, Wellington (2005): 163.

⁷⁶ Quilter v Attorney-General [1998] 1 NZLR 523: 541 (per Thomas J).

The over-all impact of the New Zealand Bill of Rights Act 1990

The New Zealand Bill of Rights Act 1990 does not contain a definition of discrimination. Rather it provides for a process by which it can be established whether or not discrimination exists. To prove the existence of discrimination requires lawful justification of the limitation on the equal rights and freedoms of an individual or group on the basis of one of the relevant grounds - prima facie discrimination (different treatment) occurs whenever a person is disadvantaged by different treatment based in an irrelevant personal characteristic.⁷⁸

It was intended that, although the New Zealand Bill of Rights Act 1990 was not supreme legislation, it would play an increasingly significant role in the way New Zealanders viewed human rights imperatives.⁷⁹

... The Bill of Rights Act is intended to be woven into the fabric of New Zealand law. To think of it as something standing apart from the general body of law would be to fail to appreciate its significance; the legal profession may be expected to become increasingly aware of this. Further it is important of course that the Bill of Rights be applied in a practical way.

Human Rights Act 1993

The original forerunner to the Human Rights Act 1993 was the Race Relations Act 1971. As well as directing itself to the specific issue of race discrimination, this was the first codification into New Zealand law of the link between domestic and international human rights laws. The long title read:

An Act to affirm and promote racial equality in New Zealand and to implement the International Convention on the elimination of all forms of racial discrimination.

⁷⁷ See further discussion on this in relation to the Quilter case in Chapter 7.

⁷⁸ From: Crown Law Office, "Discrimination in Terms of Section 19 of the New Zealand Bill of Rights Act 1990", Crown Law Office Seminar (14 February 2001).

⁷⁹ Coburn v Human Rights Commission [1994] 2 NZLR 257: submissions of Counsel for the Respondent: 57.

The Race Relations Act 1971 was followed by the Ombudsman Act 1975, which established the office of the Ombudsman, and the Human Rights Commission Act 1977, which established the Human Rights Commission. As well as extending the areas where race discrimination was unlawful, the 1977 Act also extended the categories of prohibition against discrimination beyond that of race only,⁸⁰ and consolidated New Zealand's commitment to international human rights law. The long title of this Act read:

An Act to establish a Human Rights Commission and to promote the advancement of human rights in New Zealand in general accordance with the United Nations International Covenants on Human Rights.

The Human Rights Act 1993 was designed to further consolidate the provisions of the Race Relations Act 1971, and the Human Rights Commission Act 1977.⁸¹ In fact the long title of the 1993 Act states that it is:

[a]n Act to consolidate and amend the Race Relations Act 1971 and the Human Rights Commission Act 1977 and to provide better protection of human rights in New Zealand in general accordance with United Nations Covenants or Conventions on Human Rights.

The goal of the Human Rights Act 1993 therefore is to regulate behaviour between citizens by prohibiting discrimination on a range of grounds. This is aimed at preventing discrimination from occurring⁸² or, where

⁸⁰ These now included: (a) Sex, which includes pregnancy and childbirth; (b) Marital status, which means the status of being (i) Single, or (ii) Married, or (iii) Married but separated, or (iv) A party to a marriage now dissolved, or (v) Widowed, or (vi) Living in a relationship in the nature of a marriage; (c) Religious belief; (d) Ethical belief, which means the lack of a religious belief, whether in respect of a particular religion or religions or all religions; (e) Colour; (f) Race; (g) Ethnic or national origins, which includes nationality or citizenship.

⁸¹ The grounds were further added to include: (h) disability; (i) age; (j) political opinion; (k) employment status; (l) family status; and (m) sexual orientation, meaning "a heterosexual, homosexual, lesbian, or bisexual orientation".

⁸² The grounds are: (a) Sex; (b) Marital status; (c) Religious belief; (d) Ethical belief; (e) Colour; (f) Race; (g) Ethnic or national origins; (h) Disability; (i) Age; (j) Political opinion; (k) Employment status; (l) Family status; (m) Sexual orientation. Note that grounds (a) to (g) were included in the Human Rights Commission Act 1977 (the "old" grounds, and the grounds (h) to (m) were added by the Human Rights Act 1993 (the "new" grounds).

discrimination has occurred, to provide access to remedies for persons who have been discriminated against.

The Human Rights Commission was empowered to deal with complaints from individuals who allege discriminatory behaviour by other individuals.

The Human Rights Act 1993 did not apply to actions of Government except in relation to areas where Government was acting in a similar manner to the private sector (employment, provision of accommodation, etc). However, it was intended that the sunset clause contained within the HRA would automatically expire as of 1 January 2000, and that the exemption to Government would cease.

So long as the exemption remained in force, however, the Human Rights Act 1993 did not offer an immediate and direct solution to the issue of the right to same-sex marriage. However, there have been significant changes made to the Human Rights Act 1993 since that time.

As was outlined in Chapter 6, New Zealand decriminalised consensual male-male sexual behaviour in 1986.⁸³ The original Homosexual law Reform Bill had two main parts:

- decriminalisation of male homosexual activity; and
- anti-discrimination protections for gay men and lesbians.

While the decriminalisation provisions were passed, the anti-discrimination provisions were not.

In 1993, Katherine O'Regan MP successfully reintroduced anti-discrimination provisions. As of 1 February 1994, it became illegal under the Human Rights Act 1993 to discriminate against any person on the basis of their sexual orientation in the areas of employment, housing,

The areas are: Employment; Access to Places, Vehicles, and Facilities; Provision of Goods and Services; Provision of Land, Housing, and Other Accommodation; Access to Educational Establishments.

⁸³ The Homosexual Law Reform Act 1986 received Royal assent on 11-Jul-1986 and came into effect on 8 August 1986. The Short Title of the Act provides that its object was to amend the Crimes Act 1961 "by removing criminal sanctions against consensual homosexual conduct between males, and by consequentially amending the law relating to consensual anal intercourse".

education, and the provision of goods and services.⁸⁴ At the same time, by way of consequential amendment to section 19(1) of the New Zealand Bill of Rights Act 1990, the prohibitions against discrimination were extended to the Legislative, Executive and Judicial branches of Government, as well as other persons or bodies performing public functions.⁸⁵ “Sexual orientation” was thus included, from 1 January 1994, in both the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 as an expressly prohibited ground of discrimination.

With domestic human rights legislation in New Zealand being a comparatively recent phenomenon, it has been the subject of monitoring and review. There were several significant changes resulting from one such review that led to the passing of the Human Rights Amendment Act 2001 (which came into effect on 1 January 2002). These included:

- the exemption ceased to exist for the Government, government agencies, or anyone performing a public function, accountable for unlawful discrimination under the Human Rights Act 1993;
- the New Zealand Bill of Rights standard was now applied to actions of Government (that is, the section 5 test that provides limitations to rights and freedoms can only be valid if they can be “demonstrably justified in a free and democratic society”); and, most significantly
- where legislation is inconsistent with the Human Rights Act 1993, that is, where legislation can be shown to be discriminatory (less favourable treatment without a lawful justification), the Human Rights Review Tribunal (and subsequent appeal courts) may make declaration that the legislation is inconsistent with the Human Rights Act – a Declaration of Inconsistency. The Tribunal cannot strike down an inconsistent law, but a Declaration of Inconsistency must be reported to Parliament by the responsible Minister, who must also report on how the Government intends to respond and rectify.

⁸⁴ The Human Rights Act 1993 s.21, defines “sexual orientation” as “heterosexual, homosexual, lesbian, or bisexual orientation”.

⁸⁵ See discussion above.

Summary – Human Rights Act 1993 and New Zealand Bill of Rights Act 1990

The roles of the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990 are interwoven and rather complicated. In the main, however, the HRA is designed to stop discrimination in the private sector, while the New Zealand Bill of Rights Act 1990 is designed to protect the civil and political rights of citizens vis-à-vis the State.

This has changed to some extent since the 2001 amendments to the Human Rights Act 1993 which opened up the ability of citizens to make a complaint to the Commission against any action in breach of the provisions of the Human Rights Act 1993 committed by members of the Legislature, the Executive, or the Judiciary, or any person or body performing any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.⁸⁶ Under Part 1A of the Human Rights Act 1993, this includes complaints against legislation that is inconsistent with the Human Rights Act 1993 – Declarations of Inconsistency. As a result, the Human Rights Act 1993 has a significant role to play with regard to the relationships between private citizens and the State.

In addition to the strictly domestic roles played by the Human Rights Act 1993 and the New Zealand Bill of Rights Act 1990, New Zealand human rights legislation also serves to formalise and consolidate New Zealand's commitment to international human rights obligations.

By 1993, because of New Zealand's domestic human rights legislation (and specifically because of the express inclusion of 'sexual orientation' as a protected ground in that legislation) and because of New Zealand's accession to significant international human rights treaties (particularly the International Covenant on Civil and Political Rights), New Zealand seemed to have regained some of its status as one of the more advanced jurisdictions in relation to liberal law reforms.

⁸⁶ Human Rights Act 1993 s.20J (as inserted by the Human Rights Amendment Act 2001).

It is clear is that, by the end of this period, New Zealand was well placed, to recognise and uphold human rights, non-discrimination standards in relation to a number of grounds – including, relevant to the issue of same-sex marriage, the particular grounds of sexual orientation and sex (gender). Noteworthy at this point is the fact that while sexual orientation was included expressly in New Zealand’s human rights legislation, it was not yet formally included in the Canadian “Charter of Rights and Freedoms”, nor constitutional documents in the United States of America (the Constitution of the United States or any of the State Constitutions) or the Constitution of the Republic of South Africa.

OVERSEAS JURISDICTIONS

Canada

Historic cases

Christine Davies suggests that there are ‘four waves’ of activity relating to seeking access to same-sex marriage in Canada.⁸⁷

As far back as 1974, two men in Winnipeg, Manitoba, married following the reading of the banns of marriage in their Church, and sought to have their marriage legally registered. Registration was refused, and the couple applied to the Court for a declaration that, because the marriage legislation in the province of Manitoba was gender-neutral and, because they had met all the procedural requirements (such as the publication of the banns, obtaining medical certificates, signatures of witnesses), the marriage must be registered. In this case, North v Matheson,⁸⁸ the Court conceded that the legislation was indeed gender-neutral and there was no express statutory prohibition of marriage between members of the same sex. However, the Court ruled that the common law had provided a clear definition of marriage and that, on this basis, a prohibition against same-sex marriage did exist.

⁸⁷ Davies, Christine, “Canadian Same-Sex Marriage Litigation: Individual rights, Community Strategy”, in (2008) 66:2 *U.T. Fac. L. Rev.* 101: 105.

⁸⁸ North v Matheson (1974), 20 RFL 112, 53 DLR (3d) 280 (Man. Co. Ct.).

This 'first wave' case was heard prior to the advent of the Charter.⁸⁹ At the time the case was determined, the Court relied on two key determinants:

- the concept of marriage as had been judicially defined (for example, in Hyde & Hyde v Woodmansee ⁹⁰); and
- the meaning of marriage as was "universally accepted by society".

The Court therefore held that marriage was, and could only be, a union between members of the opposite sex.⁹¹ Although the case was unsuccessful, it did signal that, should there be a shift in societal attitudes towards marriage, the notion of same-sex marriage could be a future possibility.

This definitional approach predominates in early same-sex marriage cases, and indeed in cases related to entitlements sought by same-sex couples. It will be highlighted as a feature of the early cases in the United States,⁹² and again in the consideration of the Quilter same-sex marriage case in New Zealand.⁹³ Notably, it has also constituted the core argument, along with the associated 'procreation' argument,⁹⁴ employed by opponents of same-sex marriage.

The Canadian situation was about to change. The advent of the Canadian Charter of Rights and Freedoms would offer the possibility of new considerations for those seeking access to same-sex couples seeking equality in relationship status and entitlements.

⁸⁹ The Canadian Charter of Rights and Freedoms: s.15 (the equality provisions) came into effect on 17 April 1985, three years after the rest of the Charter. The delay was to enable governments to bring their laws into line with the equality rights in s.15.

⁹⁰ Hyde & Hyde v Woodmansee (1866) [1861-73] All ER 175: 177: Lord Penzance stated that "marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others". Note that the issue in this case was bigamy - the gender of the parties was not at issue.

⁹¹ North v Matheson (1974), 20 RFL 112, 53 DLR (3d) 280 (Man. Co. Ct.).

⁹² Baker v Nelson 291 Minn. 310, at 311-312; 191 N.W.2d 185; 409 U.S. 810 (1971); Jones v Hallahan (1973) 501 S.W.2d 588 (Ky. Ct. App. 1973); and Singer v Hara 522 P.2d 1187 (Wash. Ct. App.).

⁹³ Quilter v Attorney-General [1997] 14 FRNZ 430, in the High Court, Auckland, New Zealand in 1996; and Quilter v Attorney-General [1998] 1 NZLR 523 in the Court of Appeal, Wellington, New Zealand, in 1997.

⁹⁴ See also Layland v Ontario Minister of Consumer and Commercial Relations (1993) 104 D.L.R. (4th) 214 (Ont.Div.Ct.).

The Canadian Charter of Rights and Freedoms

The Canadian Charter of Rights and Freedoms came into effect on 17 April 1982 and forms part of the Canadian Constitution.⁹⁵ The Constitution is a set of laws providing basic rules about the role and powers of federal Government and the provincial Governments, thereby regulating the relationships between the Government and the people of Canada.

The Charter plays a key role within the Constitution in that it sets out the rights and freedoms that Canadians consider to be vital in a free and democratic society. Unlike the various laws which proceeded it, the Charter is part of the supreme laws of Canada with the effect that all other laws must be consistent with it. If they are not consistent with the Charter, they may be struck down as invalid.

The two key provisions of the Charter in relation to the issue of access to marriage by same-sex couples are the equality provisions (section 15) and the provisions that outline the circumstances in which, and the extent to which, equality rights may be limited (section 1).

Equality provisions – Section 15

The equality guarantees in section 15 of the Charter provide that:⁹⁶

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In the time period covered by this chapter, the grounds of discrimination did not include sexual orientation.

⁹⁵ Canadian Charter of Rights and Freedoms s.15 (the equality provisions) came into effect on 17 April 1985, three years after the rest of the Charter. The delay was to enable governments to bring their laws into line with the equality rights in s.15.

⁹⁶ Canadian Charter of Rights and Freedoms s.15(1).

Reasonable limits – Section 1

Section 1 recognises that the rights and freedoms contained in the Charter are not absolute and can be limited in specific circumstances, and states:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Supreme Court of Canada has stated that a limit on Charter rights is acceptable if:

- the limit deals with a pressing and substantial social problem, and
- the Government's response to the problem is reasonable and demonstrably justified.

Over-all effect of the Charter provisions

To establish a violation against them by the State of the rights and freedoms as guaranteed by the Charter, an individual must show (under section 15 of the Charter) that:

- (1) he / she has received different treatment from others; **and**
- (2) this different treatment has occurred on the basis of an irrelevant characteristic (such as sexual orientation).

In order to escape the finding against it of a violation of an individual's rights and freedoms, the State must show (under section 1 of the Charter) that the different treatment is justified.

Cases on issues other than marriage

Prior to the more recent successful marriage cases (to be discussed below), there had been a number of cases seeking some level of recognition for same-sex couples. These cases met with varying degrees of success.

In 1990, Timothy Veysey challenged the refusal of prison authorities to allow his same-sex partner to visit him in prison under the Private Family Visiting Program.⁹⁷ The Court held that the exclusion of same-sex partners from the programme, which was aimed at “the maintenance of family ties and the preparation of inmates for their return to life in the community outside the penitentiaries”,⁹⁸ could not be justified under s.1 of the Charter.

In 1991, Rowles J of the British Columbia Supreme Court noted that, for a couple to be recognised under the Medical Services Act Regulations they must live together “as husband and wife”.⁹⁹ He also noted that the Regulations did not require that the couple **be** husband and wife.¹⁰⁰ The Court received expert testimony describing the type of emotional bond between homosexual couples as no different from that between heterosexual couples. The Court acknowledged that the couple did not separate when one partner became ill, and that each partner was named as the sole beneficiary in the other’s Will. In fact, the two men were:¹⁰¹

deeply committed to each other emotionally and sexually, exchanged vows and rings in a private ceremony, established a home together, pooled their finances, and shared bank accounts and credit cards.

Consequently, the Court held that the wording of the Regulations was intended to include couples living in committed, emotionally and mutually supportive relationships regardless of the sex of the individuals, and to exclude those people living together, for example, as siblings or flatmates.

In 1993, the Ontario Divisional Court heard a case in which two gay men in Ontario challenged the refusal of the City Clerk’s Office to issue them with a marriage licence.¹⁰² Ultimately, the majority in *Layland* held that

⁹⁷ *Veysey v The Commissioner of Correctional Services* (1990) 29 F.T.R. 64, later confirmed by the federal Appeals Court.

⁹⁸ Ryder, Bruce, “Equality Rights And Sexual Orientation: Confronting Heterosexual Family Privilege”, in [1990] 9 *Canadian Journal of Family Law* 39: 92.

⁹⁹ Medical Services Act Regulations 144/68 s.2.01.

¹⁰⁰ *Knodel v British Columbia (Medical Services Commission)* [1991] 6 WWR 728.

¹⁰¹ Bates, “When Is A Wife ...?” in [1993] 7 *Australian Family Law Journal* 274: 280.

¹⁰² *Layland v Ontario Minister of Consumer and Commercial Relations* (1993) 104 D.L.R. (4th) 214 (Ont.Div.Ct).

there was no discrimination because discrimination is based on irrelevant personal characteristics, and in this case the two men were denied a marriage licence due to relevant capabilities. The court held that the main purpose of marriage is procreation, and that:

that principle [sic] purpose of marriage cannot, as a general rule, be achieved in a homosexual union because of the biological limitations of such a union.

This argument around procreation is one of the two most common arguments posited by opponents in all jurisdictions where same-sex couples have sought access to the right to marry (see North and Matheson above).

United States Of America

Historic cases

Loving v Virginia,¹⁰³ was not, in itself a same-sex marriage case, but is relevant and important to the same-sex marriage cases that were to come later in the United States of America (USA).

In Loving v Virginia,¹⁰⁴ the USA Supreme Court struck down the Virginia State anti-miscegenation laws finding that the law rested solely on racial distinctions. The trial court had denied the right for an inter-racial couple to marry, using definitional defects and tradition as its reasons. The Supreme Court reasoned that:¹⁰⁵

[b]ecause laws based on racial classifications were entitled to the “most rigid scrutiny” and because there was “patently no legitimate overriding purpose independent of invidious discrimination” to justify the classification, the Court had “no doubt” that restricting the freedom to marry based on race violated the Equal Protection Clause.

¹⁰³ Loving v Virginia 388 U.S. 1 (1967).

¹⁰⁴ Loving v Virginia 388 U.S. 1 (1967): cited in Friedman, “The Necessity For State Recognition Of Same-Sex Marriage: Constitutional Requirements And Evolving Notions Of Family”, in [1987-88] 3 Berkeley Women's Law Journal 134: 139.

¹⁰⁵ Loving v Virginia 388 U.S. 1 (1967), 11: cited in Cox, “Same-Sex Marriage And Choice-Of-Law: If We Marry In Hawaii, Are We Still Married When We Return Home?”, in [1994] 5 Wisconsin Law Review 1033: 1050.

In essence, the Court had found that it is not valid to use tradition as a justification to exclude inter-racial couples from marriage (justification must be based in something more than “invidious discrimination”), that individual states are bound by a functional definition of marriage, and that the right of couples in loving and intimate relationships to enter into marriage are protected, in this case, across cultural lines.¹⁰⁶

In spite of Loving v Virginia, however, Courts in early same-sex marriage cases in the United States of America continued to apply the traditional, formal and definitional reasoning that had been applied previously in the inter-racial marriage debate.

In each of four early same-sex marriage cases, the courts held that to exclude same-sex couples from marriage was not discriminatory and that the traditional, historic definition of marriage (as being a between and man and a woman) prevailed over any contemporary challenge.

In 1971, the Minnesota Supreme Court, in Baker v Nelson,¹⁰⁷ upheld the traditional definition of marriage and rejected the equal protection and due process arguments, saying:¹⁰⁸

These constitutional challenges have in common the assertion that the right to marry without regard to the sex of the parties is a fundamental right of all persons and that restricting marriage to only couples of the opposite sex is irrational and invidiously discriminatory ... This historic institution manifestly is more deeply founded than the asserted contemporary concept of marriage and societal interests for which the petitioners contend.

¹⁰⁶ Friedman, “The Necessity For State Recognition Of Same-Sex Marriage: Constitutional Requirements And Evolving Notions Of Family”, in [1987-88] 3 Berkeley Women's Law Journal 134: 139.

¹⁰⁷ Baker v Nelson (1971) 191 N.W.2d 185, 186.

¹⁰⁸ Friedman, “The Necessity For State Recognition Of Same-Sex Marriage: Constitutional Requirements And Evolving Notions Of Family”, in [1987-88] 3 Berkeley Women's Law Journal 134: 138: It may be interesting to consider that if “marriage is as old as Adam and Eve” who was the marriage celebrant who performed their ceremony?

In 1973, in Jones v Hallahan,¹⁰⁹ the Kentucky Appeals Court, ignored the constitutional issue by declaring that the statute's implied definition of marriage required that the parties be of opposite sex, stating that "Marriage has always been considered as the union of a man and a woman".¹¹⁰ The Court had reasoned that:¹¹¹

[i]n substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is not a marriage.

In 1974, in Singer v Hara (1974),¹¹² the Washington Court of Appeals also upheld the opposite-sex requirements. The Court spent considerable time addressing a very strong philosophical and constitutional argument. The thrust of the argument was as follows:

1. Under the recently ratified state Equal Rights Amendment, men and women were entitled to be treated the same;

Therefore:

2. Women should be entitled to the same rights as men;

and:

3. Men should be entitled to the same rights as women.

Therefore:

4. If women have the right to marry men, then so do men;

And:

5. If men have the right to marry women, then so do women.

¹⁰⁹ Jones v Hallahan (1973) 501 S.W.2d 588 (Ky. Ct. App. 1973), at 590: cited in Friedman, "The Necessity For State Recognition Of Same-Sex Marriage: Constitutional Requirements And Evolving Notions Of Family", in [1987-88] 3 Berkeley Women's Law Journal 134: 139.

¹¹⁰ Jones v Hallahan (1973) 501 S.W.2d 588 (Ky. Ct. App. 1973), 589.

¹¹¹ Friedman, "The Necessity For State Recognition Of Same-Sex Marriage: Constitutional Requirements And Evolving Notions Of Family", in [1987-88] 3 Berkeley Women's Law Journal 134: 139.

¹¹² Singer v Hara 522 P.2d 1187 (Wash. Ct. App.): cited in Friedman, "The Necessity For State Recognition Of Same-Sex Marriage: Constitutional Requirements And Evolving Notions Of Family", in [1987-88] 3 Berkeley Women's Law Journal 134: 139.

It seemed that the Court was finally on the verge of breaking away from the traditional definition of marriage. But this was not to be the case. In the final analysis, the Court did not accept this line of reasoning and found that:¹¹³

... the state's statutes were not defective under either the United States Constitution or the Washington Constitution because: "Appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself".

In 1990, in Dean,¹¹⁴ the court refused to accept the validity of the right to same-sex marriage.

Hawai'i (Part 1)

In December 1990, three same-sex couples in Hawai'i renewed the battle for same-sex marriage in the United States of America by applying for marriage licences. They were declined.

In May 1991, they filed a claim in the Hawai'i First Circuit Court.¹¹⁵ The case was founded on an alleged violation of the applicants' rights to equal protection of the laws, and due process of the law pursuant to the Hawai'i State Constitution. The case was dismissed by the court

After being denied at the trial court level, the couples appealed to the Hawai'i State Supreme Court.¹¹⁶ In May 1993, Justice Levinson held that there is no fundamental right to same-sex "marriage," but also held that claim of sex discrimination was subject to a strict scrutiny test, with the burden of proof on the state. The Court described as "circular and unpersuasive" the State's submission that "the right of persons of the same sex to marry one another does not exist because marriage, by definition

¹¹³ Singer v Hara 522 P.2d 1187 (Wash. Ct. App.), 1196: cited in Cox, "Same-Sex Marriage And Choice-Of-Law: If We Marry In Hawaii, Are We Still Married When We Return Home?", in [1994] 5 Wisconsin Law Review 1033: 1050.

¹¹⁴ Craig Dean and Patrick Gill v District of Columbia No.90-C.A.-13892 (D.C. Super.Ct. filed 26 November 1990).

¹¹⁵ Baehr v Lewin First Circuit Court, Hawai'i (1991) [Full citation not known].

¹¹⁶ Baehr v Lewin 74 Haw. 530, 852 P.2d 44 (1993).

and usage, means a special relationship between a man and a woman”.¹¹⁷
In rejecting this, the Court held that:¹¹⁸

... the Hawaii marriage statute violated Hawaii's constitutional prohibition against sex discrimination and that the statute was presumably unconstitutional unless, upon remand, the State could establish that the statute was justified by a compelling state interest and was so narrowly drawn so as to avoid unnecessary abridgement of the plaintiff's constitutional rights.

Hawai'i's Supreme Court had issued the first ever decision that exclusion of same-sex couples from marriage constitutes discrimination, and went on to say that unless the State could provide a “compelling state interest” same-sex marriage must be allowed. The case was sent back to the lower court to be retried.¹¹⁹

State initiatives against marriage

At the same time that the same-sex marriage case was moving through its early stages in Hawai'i, other States in the United States of America were working to negate the possibility of same-sex marriage within their own jurisdictions. In some cases, this was to prevent the solemnisation of same-sex marriages in those particular States, and in some cases it was to pre-emptively prevent the recognition in one State of same-sex marriages from any other State that enables such marriages. Two of the first to attempt such change were Oregon and Colorado.

Oregon

The initiative in Oregon, had it been successful, would not only have prohibited same-sex marriage, but would have gone even further. In

¹¹⁷ Baehr v Lewin 74 Haw. 530, 852 P.2d 44 (1993), 60: cited in Donald G. Casswell, “Moving Towards Same-Sex Marriage” in: [2001] 80 La Revue du Barreau Canadien 810: 837.

¹¹⁸ Cox, “Same-Sex Marriage And Choice-Of-Law: If We Marry In Hawaii, Are We Still Married When We Return Home?”, in [1994] 5 Wisconsin Law Review 1033: 1039.

1992, Oregon's Ballot Measure 9 would have added the following text to the Oregon Constitution:

All governments in Oregon may not use their monies or properties to promote, encourage or facilitate homosexuality, pedophilia, sadism or masochism. All levels of government, including public education systems, must assist in setting a standard for Oregon's youth which recognizes that these behaviors are abnormal, wrong, unnatural and perverse and they are to be discouraged and avoided.

Oregon's 'Measure 9' not only would have had the effect of banning any extension of gay civil rights protection but also would have required government offices and public schools to actively discourage homosexuality.¹²⁰ It was defeated in the 3 November 1992 general election with 638,527 votes in favour, 828,290 votes against.¹²¹

Colorado

On 11 November 1992, Colorado voters, with a vote of 53.4 percent, enacted "Amendment 2", which read:

Neither the state of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of, or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination. This Section of the Constitution shall be in all respects self-executing.

¹¹⁹ Discussion on the Baehr cases continues in Chapter 7.

¹²⁰ Dunlap, Aklilu, "The Bellows Of Dying Elephants: Gay-, Lesbian-, And Bisexual-Protective Hate Crime Statutes After R.A.V. v City of St Paul", in [1993] 12 Law and Inequality 205: 213: citing Cooper, M., "Queer Baiting In The Culture War", in Village Voice (13 October 1992) 29: 29: "Gay organisations and individuals [could have been denied] use of public facilities such as parks and meeting rooms, state public broadcasting outlets [would have had] to ban pro-gay programming, state licensing boards [could have refused] those deemed 'perverse', libraries [would have had] to remove books with any positive references to homosexuality, school textbooks [would have been 'cleansed'], AIDS treatments centers [could have been] closed, and individual employers and landlords could [have kicked] out 'abnormal' employees and tenants".

¹²¹ Oregon Blue Book: Initiative, Referendum and Recall: 1988-1995, <http://bluebook.state.or.us/state/elections/elections21.htm> (Retrieved: 8 August 2009).

Colorado's Amendment 2 was passed and, at that time, made Colorado the only state in the USA to “grant the right to discriminate on the basis of sexual orientation”.¹²² Amendment 2 prohibited any municipality from protecting gay people against discrimination on the basis of sexual orientation. In so doing, it voided protective ordinances already in place in Denver, Aspen and Boulder,¹²³ and prevented the possibility of any new protective provisions.

On 15 January 1993, however, Judge Bayless of the 2nd District Court of Colorado issued a temporary injunction preventing Amendment 2 from becoming part of the State Constitution. The grounds of the injunction were:

- its possible unconstitutionality: and
- the possible irreparable harm that would be caused by its implementation.

The court scheduled a trial to consider the substantive issues. Before the trial could begin, however, the State appealed to the Colorado Supreme Court and on 19 July 1993, that court upheld the original injunction, on the grounds that Amendment 2 violated the equal protection clause of the Fourteenth Amendment to the United States Constitution, insofar as Amendment 2 denied gays equal rights to normal political processes. Chief Justice Luis Rovera wrote:

Were Amendment 2 in force ... the sole political avenue by which this class could seek such protection [against discrimination] would be through the constitutional amendment process.

The Supreme Court of the State of Colorado demanded that the legislation face "strict scrutiny" and prove that it advanced a "compelling state interest". The case was returned to the District Court for trial.

¹²² Dunlap, Aklilu, “The Bellows Of Dying Elephants: Gay-, Lesbian-, And Bisexual-Protective Hate Crime Statutes After R.A.V. v City of St Paul”, in [1993] 12 Law and Inequality 205: 213.

¹²³ Dunlap, Aklilu, “The Bellows Of Dying Elephants: Gay-, Lesbian-, And Bisexual-Protective Hate Crime Statutes After R.A.V. v City of St Paul”, in [1993] 12 Law and Inequality 205: 213.

On 14 December 1993, Judge Bayless found that the amendment failed the test, and ruled it unconstitutional.

The State of Colorado appealed to the State Supreme Court which, on 11 October 1994 confirmed the District Court's decision. The State further appealed to the U.S. Supreme Court. The US Supreme Court heard the case on 10 October 1995 and on 20 May 1996, ruled 6-3 that Colorado's Amendment 2 was unconstitutional.

South Africa

I include the information in this section not because there had been any advancement in South Africa to this point with regard to same-sex marriage, but rather to set the scene for the discussion in later chapters. As will be seen in Chapter 8, in 2005, South Africa was to become one of the first countries to extend equal marriage rights to same-sex couples. In the period up to 1986, however, there was very little to suggest that this was a possibility.

Apartheid laws had been enacted in South Africa in 1948. The segregationist apartheid regime was intended to maintain white racial domination over 'blacks' (Africans) and 'coloureds' (mixed race). The laws included, for example, prohibitions against marriage between whites and non-whites, and the sanctioning of 'white-only' jobs.¹²⁴

There was considerable internal unrest in the 1980s and this, coupled with international pressure against the apartheid regime, led to attempts at reform. Initially, these attempts were unsuccessful, but eventually, in 1994, multi-racial democratic elections were held, bringing the apartheid regime to an end. The political and constitutional changes arising from this dramatic change will be discussed in Chapter 7, along with the implications of this for the recognition of same-sex couples. Discussion on the South African same-sex marriage case and subsequent legislation will be discussed in Chapter 8.

¹²⁴ "The History Of Apartheid In South Africa", <http://www-cs-students.stanford.edu/~cale/cs201/apartheid.hist.html> (Retrieved: 27 July 2009).

Denmark

Denmark was the first country in the world to offer registered partnerships, and was therefore the first country to offer broad legal recognition of same-sex relationships. Other Scandinavian countries followed,¹²⁵ and more recently other European countries,¹²⁶ some States in the USA,¹²⁷ a province in Canada,¹²⁸ and others.¹²⁹ Other jurisdictions are either in the process of implementing, or considering the implementation of, registered partnerships.¹³⁰

The Danish Registration of Partnership Act was passed by the Danish Parliament on 1 June 1989, and signed by Queen Margrethe II of Denmark on 7 June 1989.¹³¹ It was to be this model of relationship recognition through registered partnerships that, subsequently, was to be used by many countries – either as a model to be followed, or as a model to be varied.

The Act, which came into effect on 1 October 1989, was available to same-sex couples only, and was the first in the world to grant same-sex couples a legal status which could be compared in any way with heterosexual marriage. The legislation granted virtually the full range of protections, responsibilities and benefits offered through marriage. Not included in the original Act were provisions for custody, access and

¹²⁵ For example, Norway (1993), Sweden (1995), Iceland (1996), Greenland (1996), Finland (2002).

¹²⁶ For example, The Netherlands (1998), France (1999), Germany (2001).

¹²⁷ For example, Vermont (2000), California (2000), Connecticut (2005).

¹²⁸ For example, Nova Scotia (2001), Quebec (2002), Manitoba (2002).

¹²⁹ For example, New Zealand (2005), United Kingdom (2005), Czech Republic (2006), Hungary (2007).

¹³⁰ For example, Hawai'i, Illinois and Nevada in the United States of America.

¹³¹ Danish Registration of Partnership Act, No.372 of 7 June 1989 (Lov om registreret partnerskab, nr. 372 af 7.6.1989, introduced registered partnerships ('registreret partnerskab' to Denmark.

adoption, however, this has changed more recently and one partner to a registered partnership can now legally adopt the biological child of the other partner so that both are legal parents to the child.

Under the Act, gays still cannot “marry”, however, if they wish to dissolve their “partnership” then they must go through divorce proceedings. Wherever other Danish law uses the words “marriage” or “spouse” registered partnerships are included. Where the terms “husband” and “wife” are used registered partnerships are excluded.¹³²

It seems that essentially the same arguments that are posited in the courts, or have been debated in legislatures in relation to marriage, were also heard in relation to recognition of same-sex couples by registered partnerships.

The debate leading to the Danish Act, for example, provided a platform for the opponents to present their ‘traditionalist’ principles and views based on “God, nature and the family” and the proponents to present their ‘modern’ principles and values based on “liberty, equality and justice”.¹³³

COMMENT ¹³⁴

In 1986, New Zealand decriminalised consensual homosexual activity between adult males, with the age of consent being set equal with that of consensual heterosexual activity. By 1993, New Zealand had enacted

¹³² Henson, "A Comparative Analysis Of Same-Sex Partnership Protections: Recommendations For American Reform", in [1993] 7 International Journal of Law and the Family 282: 285.

¹³³ Throckmorton, Warren, “What Can Denmark Tell Us About The Same-Sex Marriage Debate”, The American Daily (14 April 2004).

¹³⁴ The information contained in this section constitutes my comment based on information presented previously in this chapter. For that reason I have not directly referenced the source material for this section.

express legislative prohibitions against discrimination on the grounds of sex (gender) sexual orientation and marital status, amongst others. By virtue of the Human Rights Act 1993, these grounds were included in the Human Rights Act 1993 itself, and in the New Zealand Bill of Rights Act 1990. In essence, the Human Rights Act provided protections against discrimination in the private sector, and the New Zealand Bill of Rights Act provided protections against discrimination arising out of actions by, or on behalf of, Government. Furthermore, New Zealand had acceded to the United Nations' International Covenant on Civil and Political Rights, amongst other international human rights treaties. In its totality, this gave a sense that New Zealand had strong human rights legislation, and was committed to full and equal treatment for all its citizens.

In 1993, while Canada did have a strong, entrenched and supreme Charter of Rights and Freedoms, sexual orientation had not been confirmed as a ground of discrimination covered by the provisions of the Charter. At this point in time, therefore, there was no prescribed ability for citizens of Canada to take direct court action against alleged discrimination on the basis of sexual orientation.

In 1993, South Africa was still in the midst of an apartheid regime, which was not to come to an end until the following year. On the basis that there were much broader issues being tested in South Africa in 1993, with domestic and international pressure mounting against apartheid, there was no room for consideration of equality issues relating to sexual orientation.

Early same-sex marriage cases in the United States of America were unsuccessful essentially because the Courts generally adhered to a definitional reasoning when it came to marriage, stating that marriage, by definition must be between a man and a woman and that because this was the way it had traditionally been, this is the way it must remain.

During this time period, positive steps towards the legal recognition of same-sex relationships began in two separate ways. First, Denmark, in 1989 had become the first country in the world to offer the recognition of same-sex couples by registered partnerships as an alternative to marriage. Denmark was followed by Norway in 1993. Second, with the filing of the same-sex marriage of Baehr v Lewin in Hawaii, what was later to be seen substantively as the commencement of the same-sex marriage movement began.

By 1993, however, New Zealand seemingly had a favourable legislative human rights climate. With the passing of domestic human rights laws and agreement to international human rights treaties, it seemed that New Zealand might be in a strong position for positive consideration of same-sex marriage.

Chapter 7

1994 – 2000

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INTRODUCTION

In terms of the same-sex marriage issue in New Zealand, the period from 1994 to 2000 was a time when the main focus was on the presentation of the same-sex marriage case to the New Zealand courts. In 1996, the issue was placed before the High Court and, in 1997, the issue was placed before the Court of Appeal.¹

This chapter, therefore, focuses largely on developments in New Zealand at this time. The first section examines the Quilter same-sex marriage case. The second section examines what was happening (or what was not happening) elsewhere in New Zealand – for example, in Government administration and in the legislature. The chapter then moves on to consider what was happening at this time in other countries.

NEW ZEALAND – THE QUILTER SAME-SEX MARRIAGE CASE

Introduction

Marriages between same-sex partners had made news headlines in New Zealand before the Quilter same-sex marriage case in the 1990s.

In 1909, under the name Percy Redwood, Amy Bock planned to marry Agnes Ottaway in Dunedin. However, this marriage was not intended in any way as a political statement on behalf of same-sex couples. Amy Bock had previously been imprisoned on various occasions for forgery, larceny and false pretences, and was attempting to avoid the law on this instance. She was imprisoned for fraud after her ruse was discovered on the eve of the wedding.²

¹ Quilter v Attorney-General [1997] 14 FRNZ 430 (High Court); [1998] 1 NZLR 523 (Court of Appeal).

² Encyclopedia of New Zealand, (<http://www.teara.govt.nz/en>): “Notable Trials: The Notorious Amy Bock, 1909”, <http://www.teara.govt.nz/1966/T/TrialsNotable/TheNotoriousAmyBock1909/en> (Retrieved: 10 August 2009).

In 1929, Deresley Morton, who left NZ early in the century, died in California and was found to have been a woman, though she had married a woman.³

In September 1945, two women aged 30 and 18 were convicted of a criminal breach of the Marriage Act 1955. The older woman had undergone a mammectomy in order to “pass” as male so they could “marry” each other. The older woman was sentenced to three years’ probation and psychiatric treatment.⁴

None of these instances resulted in any attempt to formally challenge marriage law with a view to seek a change to enable same-sex couples to marry. Nor were there any challenges arising out of subsequent occasions on which same-sex couples have applied to the Registrar of Births, Deaths and Marriages for marriage certificates.

However, in December 1995, in Wellington, Jenny Rowan and Jools Joslin (subsequently parties to the Quilter same-sex marriage case) applied for a marriage licence. The Acting Registrar of Births, Deaths and Marriages refused to issue them with one, stating:⁵

Although the Marriage Act 1955 does not state that a female may not marry another female, such a marriage is not permissible under Common Law.

The Deputy Registrar-General wrote to them confirming this stance:⁶

The formalities of marriage in New Zealand are governed by the Marriage Act. That Act does not, as you observe, mention marriage of two people of the same sex. Same sex marriages are influenced by Common Law and at present in New Zealand are not acceptable. ... The Registrar of Marriages was acting properly in her interpretation of the Marriage Act in declining to provide you with a marriage licence.

³ Young, Hugh, “Before Stonewall and NZ Gay Liberation – Part 1”, <http://www.queerhistory.net.nz/Part1.html> (Retrieved: 10-Aug-2009).

⁴ Young, Hugh, “Before Stonewall and NZ Gay Liberation – Part 1”, <http://www.queerhistory.net.nz/Part1.html> (Retrieved: 10 August 2009).

⁵ Letter to Applicants (Jenny Rowan and Jools Joslin) from Acting Registrar of Births, Deaths and Marriages, Wellington District Office, Wellington (December 1995).

⁶ Letter to Applicants (Jenny Rowan and Jools Joslin) from the Deputy Registrar-General of Births, Deaths and Marriages, Central Registry, Lower Hutt (15 December 1995).

It is an accepted principle that the role of the Courts is to interpret legislation. The issue of same-sex marriage per se had never been before the Courts in New Zealand. Any mention of same-sex marriage, and any associated comment on the meaning of the Marriage Act, has been nothing more than obiter dicta within cases dealing with other issues.

What occurred here was that the Office of the Registrar-General of Births, Deaths and Marriages was interpreting the legislation on the basis of obiter from judicial considerations of marriage in other jurisdictions, in other chronological contexts, and in relation to other marriage-related issues. The Office referred particularly to the case of Hyde v Hyde and Woodmansee, an English case of 1866 on the issue of bigamous marriages.

In this sense, it is arguable that the administrative arm of Government had assumed, for itself, the role of the Courts – statutory interpretation. While it must be assumed that the administration is always seeking to establish the meaning of the legislation that it is required to administer, it can also be assumed that parties who disagree with that interpretation must also be free to seek the opinion of the court on that interpretation.

The two women believed that the Human Rights Act 1993 protected them from being discriminated against. They also considered that if:

- (a) the Marriage Act 1955 could be viewed as being gender-neutral in terms of the language expressly used in the Act; and
- (b) the issuance of a marriage licence could be viewed as the provision of a service; then
- (c) it was possible to argue that the Registrar-General of Births, Deaths and Marriage was acting unlawfully (contrary to the Human Rights Act 1993) by not issuing a marriage licence to them.

However, when a complaint was lodged with the Human Rights Commission on the same-sex marriage issue, the Commission responded

that it was unable to assist, saying:⁷

Unfortunately, it appears that your complaint of discrimination falls outside the jurisdiction of the Human Rights Commission at this time. Section 151(2) of the Human Rights Act 1993 provides an exemption for anything done “by or on behalf of the government of New Zealand” ... and this includes anything done by the Registrar-General under the powers of the Marriage Act 1955.

Secondly, and also as a result of the sunset clause, it was not possible under the Human Rights Act 1993 to mount a substantive challenge to any existing statute that was prima facie discriminatory:⁸

Except as expressly provided in this Act, nothing in this Act shall limit or affect the provisions of any other Act or regulation which is in force in New Zealand.

The effect of this provision was that, until its expiry,⁹ when it was planned that all legislation would have been vetted for consistency with the prohibitions against discrimination, no statute which was inconsistent with the Human Rights Act 1993 could be deemed to be unlawful.

The issue therefore became whether or not the Marriage Act 1955 was, in fact, expressly discriminatory, and therefore protected by s.151(1), or whether the language was gender neutral, and therefore compliant with the Human Rights Act 1993, but being applied in a discriminatory fashion.

In the final analysis, it was decided that, at that time, the Human Rights Act 1993 did not provide the applicants with a sufficiently clear path to achieving their goal. The Human Rights Act 1993 assisted in painting a picture of the human rights climate in New Zealand but, mainly because of the sunset clause in relation to Government actions, it did not provide an avenue for challenging the actions of officials.

⁷ Letter from the Human Rights Commission to Jools Joslin and Jenny Rowan in response to their complaint of discrimination by the Registrar-General of Births Deaths and Marriages on the grounds of sexual orientation (27 February 1996).

⁸ Human Rights Act 1993 s.151(1).

⁹ Under the Human Rights Act 1993, this was set at midnight on 31 December 1999, however, with the later passing of the Human Rights Amendment Act 1999, the expiry date became midnight on 31 December 2001.

Petitioning the Court for Marriage

The New Zealand same-sex marriage case ¹⁰ was taken, not only because gays and lesbians are seeking the right to marry per se, but also because we are seeking recognition of the right to "full and equal treatment under the law". At the time the case was taken, as remains the current situation, same-sex couples did not have the same choice about whether or not to marry that was available to different-sex couples. In turn, this meant that same-sex couples did not have the same choice with regard to accessing or not accessing the raft of legal protections which opposite-sex married couples take for granted.

Having considered the general human rights climate in New Zealand, with a belief that New Zealand's domestic human rights law could require a favourable interpretation of a gender-neutral Marriage Act, and with a realistic recognition of the difficulties ahead, three couples went to Court seeking the right to marry. It was hoped that, by placing their stories within the context of the human rights climate of New Zealand, the judges involved might recognise that denying same-sex couples access to the Marriage Act, and therefore denying the right to marry, was discriminatory and therefore contrary to New Zealand law.

On 24 April 1996 the three lesbian couples who were the named plaintiffs in Quilter ("the Plaintiffs") appeared before the High Court in Auckland, seeking a declaration that the Registrar-General of Births, Deaths and Marriages was acting in breach of New Zealand law by not issuing marriage licences to same-sex couples who wished to get married:¹¹

The plaintiffs seek a declaration that, being same-sex couples, they are none the less entitled to obtain a marriage licence and marry pursuant to the provisions of the Act.

The basic premise of their legal argument was that the Marriage Act 1955 did not stipulate that parties to a marriage need be a man and a

¹⁰ Quilter v Attorney-General [1997] 14 FRNZ 430 (High Court); [1998] 1 NZLR 523.

¹¹ Quilter v Attorney-General [1997] 14 FRNZ 430: 433.

woman and that officials had acted in breach of New Zealand human rights law by refusing to issue a marriage licence.

The case was initially heard on 24 April 1996 before Justice Kerr of the High Court in Auckland. As a result of the hearing, Justice Kerr declined to issue the declaration sought, holding that, although the law as it stood was discriminatory, the Marriage Act 1955 could not be interpreted as including same-sex couples – any change to that law was a matter for Parliament.

On 3 September 1997, an appeal was heard in the New Zealand Court of Appeal. The bench of five held unanimously that same-sex couples could not marry under existing New Zealand law. Two of the Justices, however, did state that the legislation was discriminatory, but held, like the High Court, that any change to permit same-sex couples to marry must be made by Parliament.¹²

In December 1998, Communication No. 902/1999, Joslin v New Zealand was submitted to the United Nations Human Rights Committee, under Article 2 of the Optional Protocol to the International Covenant on Civil and Political Rights. The Communication urged the Committee to declare that the New Zealand Government, by excluding same-sex couples from the Marriage Act 1955, was in breach of its obligations under Covenant Articles 16, 17, 17 juncto 2.1, 23.1 juncto 2.1, and 23.2 juncto 2.1, and 26.

The Appellants' Arguments Before the Courts

In essence, the Appellants¹³ submitted that the failure to issue marriage licences to them under the provisions of the Marriage Act 1955, as interpreted in light of the discrimination provision of the New Zealand

¹² Quilter v Attorney-General [1998] 1 NZLR 523: see judgments of Thomas and Tipping JJ.

¹³ In general, this discussion relates to the Quilter appeal to the Court of Appeal. For this reason, the complainants are referred to as “the Appellants”. There may be some references to the High Court case and to the Communication to the United Nations Human Rights Committee where the term “Appellant(s)” may not be appropriate, strictly speaking, but may be used for purposes of consistency and continuity.

Bill of Rights Act 1990, was in breach of New Zealand law. The Plaintiffs relied on reading together the relevant provisions of the Marriage Act 1955 and sections 19, 6 and 5 of the New Zealand Bill of Rights Act 1990.

The argument was that:

- (a) the eligibility provisions of the Marriage Act 1955 are gender neutral and 'marriage' is not defined by the Act; and
- (b) the Bill of Rights Act 1990 s.19 provides that "[e]veryone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993", which include "sex" and "sexual orientation";¹⁴ and
- (c) the Bill of Rights Act 1990 s.6 provides that "[w]herever an enactment can be given a meaning that is consistent with the rights and freedoms contained the this Bill of Rights Act, that meaning shall be preferred to any other meaning"; and
- (d) to avoid unjustifiable discrimination on the grounds of sex or sexual orientation, the Marriage Act 1955 must be interpreted as extending eligibility for a marriage licence to same-sex couples;
- (e) a "male-female only" interpretation would not be a "reasonable limit" on the Plaintiffs' rights under the Bill of Rights Act s.19(1) that could be "demonstrably justified in a free and democratic society under the Bill of Rights Act s.5;
- (f) a gender-neutral, non-discriminatory interpretation of the Marriage Act 1955 was supported by obligations which New Zealand had accepted under international human rights instruments.

The Appellants further argued that the Bill of Rights s.4 was not relevant, because none of the provisions of the Marriage Act 1955 is expressly or impliedly inconsistent with the Bill of Rights Act 1990.¹⁵

¹⁴ Human Rights Act 1993 s.21(a) and s.21(m) respectively.

¹⁵ 4. Other enactments not affected –

No court shall in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –

Rather, the 1955 Act can, and must, be interpreted under the Bill of Rights Act s.6 in a way that is consistent with the Bill of Rights Act s.19(1).

Gender neutrality and the Marriage Act 1955

All provisions within the Marriage Act 1955 that deal with the eligibility of persons to marry are gender neutral. The Marriage Act 1955 itself does not define marriage in a manner which restricts marriage to being between a man and a woman. In general, the Act employs gender-neutral language such as “person” or “persons” and “party” or “parties”.¹⁶ In fact, there is nowhere in the body of the Act that categorically gender-specific language is used.

There are two provisions which require further clarification, both of which, the Appellants argued, are insufficient to render the Marriage Act incapable of being interpreted to include same-sex couples.

- (1) Section 33(2) employs the words: “I call on the people present here to witness that I, A.B., take you, C.D., to be my legal wife (or husband), or words to similar effect”. The Plaintiffs argued that these provisions do not preclude a man from saying: “I take you to be my legal husband”, or a woman from saying “I take you to be my legal wife”. That is, by virtue of that phrase, the provision can be applied gender-neutrally.

Conversely, if the phrase “or words to similar effect” were not included (which it is), these provisions could only be interpreted as being gender specific.

- (2) The Second Schedule to the Act outlines "Forbidden Marriages". The Schedule lists those persons whom a man may not marry

(a) hold any provisions of [an] enactment ... in any way invalid; or
(b) decline to apply any provision of any enactment –
by reason only that the provision is inconsistent with any provision of this Bill of Rights”.

¹⁶ Marriage Act 1966 s.3, for example, states: “The provisions of this Act, so far as they relate to the capacity to marry, shall apply to the marriage of **any person** domiciled in New Zealand at the time of the marriage, ...”. (Emphasis added).

(twenty classes of female relatives), and those persons whom a woman may not marry (twenty classes of male relatives). It does not list relatives of the same sex.

There is much legislation, dating from past decades, where gender specific language is used in a manner which is not deemed to be appropriate in modern times. Under the Interpretation Act 1999 s.31, where the masculine gender is used in any legislation prior to 1999, it can be interpreted to include the feminine.¹⁷ The Appellants argued that using this provision, it is possible to interpret the Schedule of forbidden marriages to read that a man may not marry his son, or his brother, etc, and that a woman may not marry her daughter, or her sister, etc.

Gender neutrality and the Family Proceedings Act 1980

The Family Proceedings Act 1980 is also gender neutral. Section 31(1)(a) of the Act lists the grounds on which a marriage may be declared void:

- (i) one party is already married;
- (ii) by reason of duress, mistake, insanity or other absence of consent;
or
- (iii) the parties to the marriage are within the prohibited degrees found in the Second Schedule to the Marriage Act.

There is no statutory provision which expressly states that a marriage will be void where the parties to the marriage are of the same gender.

Discrimination and Interpretation

The plaintiffs submitted that it is necessary to address the issue of discrimination first. If *prima facie* discrimination exists, then it is necessary to consider whether or not that discrimination is objectively justifiable. If no discrimination exists, then there can be no case for the Attorney-General to answer.

¹⁷ 31. Use of masculine gender in enactments passed or made before commencement of this Act – In an enactment passed or made before the commencement of this Act, words denoting the masculine gender include females. (Note that this 1999 provision replaced a similar earlier provision).

Discrimination

Counsel for the Appellants had the following to say about discrimination:¹⁸

Counsel for the appellants submit that discrimination can be defined as being, in essence, less favourable treatment of the complainant or a wider class of which he or she forms part, on one of the prohibited grounds.

To establish less favourable treatment it is sufficient to show that the complainant or class is or are being deprived of a choice or opportunity valued by them personally, being so valued on reasonable grounds.

Secondly, 'on the grounds of' does not require proof of motive or intent on the part of the respondent or any other person; the test as to the link between the unfavourable treatment and the prohibited grounds is objective, and intention and motive are irrelevant.

Counsel for the Appellants then argued that denial of access to the Marriage Act 1955 was “less favourable treatment” on the prohibited grounds of “sex”¹⁹ and / or “sexual orientation.”

Interpretation

The Plaintiffs argued that a reading together of the New Zealand Bill of Rights Act 1990 ss.3, 6 and 19 mandated the eligibility of same-sex couples to marry under the Marriage Act 1955.²⁰

It was contended that, because the Marriage Act is gender-neutral, it can be interpreted to include same-sex couples as required by the Bill of Rights Act s.6. It was further contended that s.6 required the Court to **strive** to interpret a statute consistently with the Bill of Rights Act – and to do so in the context of the late 1990s and the post Bill of Rights era, rather than step back to 1955. The Marriage Act could be, and therefore must be, interpreted to include same-sex couples.

¹⁸ Quilter v Attorney-General [1998] 1 NZLR 523: Submission of Appellants: 20.

¹⁹ Relying on Baehr v Lewin.

²⁰ New Zealand Bill of Rights Act 1990:

Section 3: Application: “This Bill of Rights applies to Acts done (a) by the legislative, executive or judicial branches of government ... or (b) by any person or body in the performance of any public function ...”.

Section 6: Duty of consistent interpretation.

Section 19: Prohibition of sex and sexual orientation discrimination.

International Law

In the submissions to the Court, there was some reliance on international law.²¹ Under international law, New Zealand has accepted obligations to accord its citizens equal protection under the law and to actively promote the removal of discrimination. Relevant international human rights treaties to which New Zealand has agreed include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child.²²

International obligations, even if not incorporated directly into the domestic law, are relevant to its interpretation when there are gaps or obscurities in the common law, or ambiguity in statute law.

Counsel for the appellants submitted that the Government had assumed an obligation to ensure the protection of all citizens from all forms of arbitrary discrimination, and, where such discrimination is in existence, to positively act in such a way that this discrimination will be eliminated.

High Court Judgment

Introduction

The Plaintiff couples applied to the High Court in Auckland for:²³

... a declaration that, being same-sex couples, the plaintiffs were none the less lawfully entitled to obtain a marriage licence and marry under the provisions of the Marriage Act 1955.

²¹ The role of international human rights law in relation to this issue will be discussed in greater detail in Chapter 8.

²² The Plaintiffs relied on the International Covenant on Civil and Political Rights: Art.23.2, read together with provisions in Convention for the Elimination of Discrimination Against Women relating to the right to marry and form a family; and the International Covenant on Civil and Political Rights: Art. 26 and 2.1, using the Toonen decision that “sex” is to be taken to include “sexual orientation” (Toonen v Australia, Communication No. 488/1992).

²³ Quilter v Attorney-General (1996) 14 FRNZ 430: 432.

Essentially therefore, the issue before the courts was whether the Marriage Act 1955 can be read in such a manner that same-sex couples are permitted to marry under that Act.

The six Justices involved in this case (one at High Court level, and five at Court of Appeal level, all approached the issue differently, although there were similarities amongst the reasonings of some of them.

Justice Kerr (Kerr J), at the High Court in Auckland, approached the issue in the manner suggested by the plaintiffs, namely, commencing with a consideration of whether or not refusal to grant a marriage licence to same-sex couples was discriminatory, and then considering whether or not it is possible for same-sex couples to be included in marriage under the existing Marriage Act 1955.

In relation to the discrimination question, Justice Kerr held that by not being permitted to marry, same-sex couples are being discriminated against. In relation to the interpretation question, he found that the meaning of marriage is clearly established and that, based on this clear meaning, Parliament is entitled to exclude of same-sex couples from the Marriage Act 1955 – this exclusion is therefore justified in terms of the New Zealand Bill of Rights Act 1990 s.5. If there is to be any change to the meaning of the Marriage Act, he stated, it is not the place of the Court to make that change, but it is up to Parliament to respond by changing the law.

There were some concerns for us in the reasoning, (discussed below) but at least the Court had declared that discrimination exists. We came away from Auckland with the Court having stated that, by being denied access to marriage, gays and lesbians were being treated less favourably than other New Zealanders, and that this treatment impacted on them detrimentally.

In reaching his conclusion, Kerr J considered a range of matters related to the issue of same-sex marriage. The matters of concern within his considerations may appear, at first glance, to be comparatively insignificant, but their significance lies in the insight that they give to how the Court approached a gay and lesbian issue.

Justified limitations

Having decided that, by being denied access to marriage, same-sex couples are being *prima facie* discriminated against, the Court did not require the Attorney-General to justify this denial, but went on to say:²⁴

*Pursuant to s 5, Parliament is **entitled** to reasonably limit the persons able to marry so that couples of the same sex are not entitled to go through a marriage ceremony (Emphasis added).*

Strictly-speaking, this approach is not correct. It is correct that limitations can be imposed, but Parliament is not “entitled” to impose limitations without reason. Any limitations must be “demonstrably justified”,²⁵ and the onus of proving demonstrable justification lies with the party asserting it – it does not fall to the group pleading protection from discrimination to prove that such limitations do not exist.²⁶ In this case, therefore, the Court should have spelled out clearly that, in this case, it is the Crown which must prove any such justification.

This is an extremely important distinction, and goes to the core of the rationale for human rights laws.

Behaviour versus indecency

Another element of concern in Kerr J’s reasoning lies in his consideration of the issue of the decriminalisation of homosexuality. A legacy of prejudice lingers in his statement that:²⁷

*It is no longer an offence for males of 16 years or over to commit **indecenties** with each other which are consensual, consent not being obtained by false or fraudulent representations (emphasis added).*

What the Court is implying here (incorrectly) is that, subsequent to the passing of the Homosexual Law Reform Act 1986, consensual sexual behaviour between two adult males has remained an indecent act. In

²⁴ Quilter v Attorney-General [1996] 14 FRNZ 430: 454.

²⁵ New Zealand Bill of Rights Act 1990 s.5.

²⁶ See comments on Baehr v Lewin (Hawai’i) in Chapter 8.

²⁷ Quilter v Attorney-General [1996] 14 FRNZ 430: 441.

fact, the primary effect of the 1986 Act was to declare that consensual adult homosexual behaviour was no longer to be considered indecent or criminal. In this statement, the Court illustrates its failure to understand that the underlying effect of the Homosexual Law Reform Act 1986. The implication of the Court's reasoning here is that homosexual behaviour is still seen as deviant, not normal, an indecency. This failure to understand the legal climate as it affects lesbians and gay men as individuals, and, by implication, our rights in relation to each other and the wider community must colour the approach of the Court with regard to any considerations about whether or not same-sex (homosexual, gay, lesbian, abnormal, deviant, aberrant) relationships should be recognised in the law in exactly the same way that different-sex (heterosexual, normal, conventional) relationships should be recognised.

Gender

After considering transgender cases (particularly cases relating to the marriage of transgender persons)²⁸ Kerr J stated that:²⁹

... in New Zealand for a marriage to take place there must be parties who visually at least are male and female.

Does this mean that one party to the marriage must wear a dress and the other must wear trousers? Does it mean that one party to the marriage must have male genitals and the other must have female genitals? What about other characteristics which are not "visually" ascertainable – chromosomes, personal identity? Where does that leave us with the situation where a hormonally transitioned male-to-female transsexual chooses not to change her birth certificate and therefore is able, as an "official" male (birth certificate) but "visual" female, to marry a female? Where does this leave us with a transitioned female-to-male transsexual (born female but visually male) who has chosen to change his birth certificate and therefore is able, as a "birth" female but as a "visual" male, to marry a female?

²⁸ Attorney-General v Family Court at Otahuhu (1994) 12 FRNZ 643; [1995] NZFLR 57 (HC).

²⁹ Quilter v Attorney-General [1996] 14 FRNZ 434.

The case of Attorney-General v Family Court at Otahuhu,³⁰ established that, under New Zealand law, transsexuals can, in fact, choose to marry a person of either gender. A male-to-female transsexual can, by law, (a) choose not to register a change of gender and marry a female (both parties "visually" female), or (b) choose to register a change of gender and marry a male (both parties born male). It can be argued that this analysis supports same-sex marriage as opposed to denying it. However, Kerr J fell short of understanding the intricacies of issues of gender identity, biological / physical gender, legal gender, and sexual orientation.

Court of Appeal judgments

The decision of Kerr J was appealed to the Court of Appeal whose majority decision was that, because the meaning of marriage is so well understood to be between a man and a woman, the Marriage Act 1955 cannot be interpreted to give same-sex couples access to marriage. They also concluded that, if there were to be any change made to the laws relating to the recognition of same-sex couples by way of the Marriage Act 1955, it was up to Parliament to consider and make those changes.

However, in reaching this decision on the matter of whether the Marriage Act 1955 can be read in such a manner that same-sex couples are included within its ambit, the members of the bench of the Court of Appeal each approached the issue differently.

President Richardson

Justice Richardson, President of the Court of Appeal (Richardson P) at the time of its consideration of the Quilter case, presented a particularly brief written decision. It should be assumed that President Richardson turned his mind to the issues before the Court, and upon conferring with his colleagues and reading their formulation of their thoughts, he decided he had nothing further to add.

³⁰ Quilter v Attorney-General [1996] 14 FRNZ 430.

At the same time, however, one of the litigants in the case took offence at what was perceived as the Richardson P failing to recognise the significance, for gays and lesbians, of the matter before the Court, and choosing not to apply his time to the issues. This perceived lack of consideration of the issues was described as “an insult to gays and lesbians in New Zealand”. It was stated that it could be reasonably expected of the President of the Court of Appeal that, in a case of such huge importance to gays and lesbians (and to human rights generally) he would do more than read the judgments of his peers, agree with them and, in some 220 words, dismiss the appeal.³¹

Justice Gault

Justice Gault (Gault J) gave the matter rather more consideration. Unfortunately, however, and with all due respect, I have some serious reservations about the efficacy of his reasoning, especially the manner in which he attempts to address the question of discrimination. The basis for his conclusion that in this case there is discrimination neither on the basis of sexual orientation nor on the basis of sex is unsustainable. He states:³²

There would have been no different reaction had the Plaintiffs been male or if they had been heterosexual and simply seeking a marriage relationship to take advantage of perceived civil benefits.

His reasoning in simple terms:³³

- (a) There is no discrimination on the basis of sexual orientation because the Registrar of Births, Deaths and Marriages would respond exactly the same if the application were made by two heterosexual men as he would if the application were made by two gay men.
- (b) There is no discrimination on the basis of sex because the Registrar of Births, Deaths and Marriages would respond exactly the same if

³¹ Quilter v Attorney-General [1998] 1 NZLR 523: 526.

³² Quilter v Attorney-General [1998] 1 NZLR 523: 527.

³³ Quilter v Attorney-General [1998] 1 NZLR 523: 527.

the application were made by two women as he would if the application were made by two men (Quilter [1998] 1 NZLR 523, 527).

This analysis ignores indirect sexual orientation discrimination – that is, differentiation which, while it appears to treat everyone the same, in fact impacts on one group more adversely than another. Under the New Zealand Bill of Rights there is no actual distinction between direct and indirect discrimination, the term discrimination being employed for Bill of Rights purposes to cover both. This means that Justice Gault has in fact ignored discrimination.³⁴

Gault J then goes on to minimise, marginalise, and invisibilise the reality of same-sex relationships and to undermine and deny their significance to the couples involved. His statement that denial of choice only affects those who wish to make the choice ³⁵ gives rise to two concerns about his reasoning.

First, he passes off the attraction between one gay man and another as mere choice. His reasoning denies a real and actual link between the fact that a gay male will seek to enter into a long term commitment with another male precisely because of the very nature of his sexual orientation. It is because he is a gay male that he will seek to enter into a relationship with another male. There is something illogical about expecting a gay male to “choose” to enter into a relationship with a woman if he wishes also to choose to get married. Alternatively, even following Gault J’s own reasoning, the final effect of this must be that if a person makes a particular choice because of his / her sexual orientation and that choice is denied, sexual orientation discrimination must result in relation to the right to freedom of choice.

Second, Gault J further minimises the significance of the notion of objectively justifiable limitations which is so central to this case. Is there not a clear difference between, on the one hand, not allowing a marriage by one person to (a) another person who is already married, or (b) a child

³⁴ There is a distinction between direct and indirect discrimination under the Human Rights Act 1993.

³⁵ Quilter v Attorney-General [1998] 1 NZLR 523: 527.

and, on the other hand, not allowing marriage by one person to another person on the sole basis that “we” (meaning certain members of society) don’t like the idea? There are objectively justifiable reasons for not permitting a person to marry someone who is already married – essentially around undermining the existing family unit and effects on other parties (existing partner, children) – or someone who is not of a prescribed age – essentially around the ability to give freely of their consent to the relationship and thereby not be the victim of abuse, etc. Gault J gives himself the opportunity to give his justifications for allowing less favourable treatment of gay and lesbian couples, but does not do so. He merely states that “[j]ustification for differences will be found in social policy resting on community values”,³⁶ but he does not explore this further.

Essentially, Gault J finds that there is no discrimination (because gays and lesbians can choose to live as heterosexuals) and, even if there were discrimination, it would be justifiable (because that is the way it has been, and that is the way it is).

Justice Keith

Justice Keith (Keith J) found that the right to marry could not be decided by reference to the New Zealand Bill of Rights Act 1990 s.19. He gave three key reasons for his view that s.19 did not “reach” the issue of same-sex marriage:

- 1) The view that a ban on same-sex is discriminatory is not supported by overseas jurisprudence. Human rights should be “understood and applied in a pragmatic, functional way” with discrimination on some grounds being more suspect than others.
- 2) The general language [of the New Zealand Bill of Rights Act] would have been a remarkably indirect way to effect such a major change in a basic, social, religious, public and legal institution.

³⁶ Quilter v Attorney-General [1998] 1 NZLR 523: 527.

- 3) There is a vast array of incidents attached to marriage which “all emphasise the extreme unlikelihood of a change in the basic elements of marriage being made in such a way as by way of enactment of section 19”. Parliament had, in fact, approached the matter of the legal treatment of same-sex couples in a particularistic manner.

I respond to the above points are as follows:

- 1) In New Zealand, there is very little adherence to the notion of suspect classes and non-suspect classes. Clearly, under our human rights legislation we have 14 grounds of prohibition against discrimination – and all are considered equal. To suggest that some classes are more suspect than others is to suggest a hierarchy of rights which is not appropriate in New Zealand and is not the intention of our human rights legislation.

It must also be remembered that the issue here is not about whether or not the grounds of sex or sexual orientation are protected grounds under the New Zealand Bill of Rights Act 1990 – they are expressly so without question. The issue here is about whether or not same-sex couples are being discriminated against by being denied recognition of their relationships by marriage.

- 2) The New Zealand Parliament has directed, by way of its human rights legislation, that it is not acceptable for discrimination to exist in certain circumstances, and it is the courts’ role to act in accordance with that direction. Furthermore, we have ample examples of human rights legislation being applied in such a way that new policy is being created. Human rights is based on broad, liberal, inclusive language and is designed to be a check against discriminatory practices. That does not make adherence to human rights standards an indirect means of effecting social change.
- 3) It is interesting that Keith J mentions the particularistic approach adopted by Parliament.³⁷ For me, such an approach causes real concerns. It implies that it is acceptable to work towards

³⁷ Quilter v Attorney-General [1998] 1 NZLR 523: 560.

compliance with human rights standards over a period of time. This is not an acceptable response to the correction of discrimination or human rights legislation non-compliance. The incremental / progressive approach to human rights suggests that there is such a thing as partial equality – there is not. We either have equality or we do not.

Keith J also gets caught in the same argument as Gault J, namely, that the refusals to issue marriage licences “were not on the grounds of the sexual orientation of each applicant” because the denial of marriage licences to the same-sex couples:³⁸

involved no breach of the right to freedom from discrimination on the grounds of the sex of each applicant, since each and every individual seeking to marry someone of the same sex would be equally refused.

Keith J also puts forward an unusual argument in which he implies that if it is discriminatory to deny same-sex couples access to marriage, then it must also be discriminatory to deny others. His reasoning is as follows:

If ...

to deny a couple access to marriage on the basis that both parties are male is discrimination on the basis of gender; and if ...

denying a couple access to marriage on the basis that one party is a gay man and therefore seeks a gay man as a marriage partner is discrimination on the basis of sexual orientation;

then ...

to deny a couple access to marriage because one partner is already married must be discrimination on the basis of marital status; and ...

to deny a couple access to marriage because one partner is not capable of giving his or her voluntary consent must be discrimination on the basis of disability; and ...

³⁸ Quilter v Attorney-General [1998] 1 NZLR 523: 557.

to deny a couple access to marriage because he or she has not reached the age of majority must be discrimination on the basis of age; and

to deny a couple access to marriage because they are within the prohibited degrees of relationship must be discrimination on the basis of family status.

It is true that, in each of these instances, there is *prima facie* discrimination, but Keith J fails to pursue the issue of “objective justification”.

In each of the instances he cites, there is an objective reason why marriage has been denied. For example:

- one party already married – stretching of financial and physical resources – not so beneficial for children especially;
- mental capacity – the ability to give informed consent;
- age of majority – ability to give informed consent;
- prohibited degree of relationship (affinity / consanguinity) – damage to the gene pool.

When it comes to granting access to marriage for same-sex couples, however, there is, to date, no proven objective justification. The usual attempts at objective justification (compelling reason in some overseas jurisdictions) against same-sex marriage are based in religion or social convention (tradition).

The most common arguments against same-sex marriage tend to be those around procreation and the raising of children (the “best interests” of any children). But, these two arguments do not stand up to scrutiny. They have not been successful in the New Zealand Court of Appeal.³⁹ Nor have they been successful in cases such as Baehr v Lewin in Hawai‘i (USA), Baker v Vermont in Vermont (USA), British Columbia (Canada) and Halpern et al v Canada (A-G) et al and MCC of Toronto v Canada (A-G), Ontario (Canada).⁴⁰

³⁹ Quilter v Attorney-General [1998] 1 NZLR 523.

⁴⁰ Halpern et al v Canada (A-G) et al, and MCC of Toronto v Canada (A-G) et al.

The State, in Baehr v Lewin, went to great lengths to argue a compelling State reason for denying same-sex marriage on the basis that it would be detrimental to children. One of the State's own expert witnesses was declared by the Court to be "not credible", and the other three expert witnesses for the State gave evidence in support of same-sex marriage. These experts stated that there was no known detriment to children as a result of them having two parents of the same gender. They also gave evidence that, to the contrary, it was beneficial for children to live in a home where the parents were married, as marriage brings a social approval and status which in turn provides a security for the family. There are also, of course, the added legal protections that flow from marriage which are not available to couples who are not married, and their families.

Perhaps the most disappointing element of Keith J's considerations, as a respected international jurist, lies in his blanket rejection of international developments of same-sex marriage. He relied on:⁴¹

... the non-acceptance of the world community of any support for a right to same sex marriage based on the principle of equality or the prohibition on discrimination ...

This statement ignores the registered partnership laws of Denmark, Norway, Sweden, Iceland and the Netherlands as well as the Hawai'i Supreme Court's preliminary ruling in Baehr v Lewin. There have been other developments since the Quilter case, but even at that time, there had been increased discussion of the topic, along with some major developments. There had been considerable movement towards marriage-like recognition of same-sex couples, as well as the Hawai'i Supreme Court, in effect, granting marriage rights to same-sex couples, although this right was removed by a change to the Constitution of the State of Hawai'i resulting from a public referendum.

In short, while more comprehensive in terms of the amount of information contained in Keith J's judgment, there is a lack of information to show an in depth understanding either of the legal issues or the impact of exclusion on same-sex couples and their families.

⁴¹ Quilter v Attorney-General [1998] 1 NZLR 523: 563.

Justice Tipping

Justice Tipping (Tipping J) agreed that there was no need to decide the discrimination issue, but added, in obiter dicta, that:⁴²

... the impact of the prohibition inherent in the Marriage Act against same-sex marriages is much more significant for people with a same-sex orientation than it is for people of heterosexual orientation. ... Prima facie ... I see the inability of homosexual and lesbian couples to marry as involving discrimination against them on the grounds of their sexual orientation.

In this analysis, Tipping J goes considerably further than Richardson P, Gault J or Keith J. Not only does he consider whether or not there is different treatment, but also he assesses the effect of that different treatment arriving at the conclusion that it affects a particular group of persons (that is, gays and lesbians) to greater detriment than other persons. Unfortunately, he did not go on to address the question of whether or not this discrimination is justifiable.

He did go as far as saying that a consideration of whether or not the traditional concept of marriage is prima facie discriminatory cannot be influenced by historical and religious factors, but must be an objective assessment of the provision based upon correct processes of statutory interpretation.⁴³ However, even if the Courts find that discrimination does exist, he appears to give Parliament a licence to retain the discriminatory definition of marriage if "society wishes nevertheless to maintain the traditional concept of marriage", rather than requiring the Crown to justify such different treatment.

Essentially, Tipping J held that, if the Marriage Act 1955 is truly gender neutral and the Court is able to interpret it so as to include same-sex couples, then the Court is free to declare this to be the case. In this, Tipping J was saying that the meaning of the Marriage Act, as generally understood in the law, must be gender neutral, rather than the wording of the statute itself, and that the Court cannot employ the provisions of

⁴² Quilter v Attorney-General [1998] 1 NZLR 523: 575-576.

⁴³ Quilter v Attorney-General [1998] 1 NZLR 523: 572.

the New Zealand Bill of Rights Act 1990 to change the meaning of marriage:⁴⁴

We may interpret, but we cannot rewrite or legislate. The Bill of Rights must be given its full effect in the necessary process of interpretation, but it may not be used as a concealed legislative tool. It is clearly implicit in what the Bill of Rights says, (s 4), and what it does not say, that Parliament has reserved to itself all legislative functions.

At the same time, Tipping J also expresses his preference for defining a right, bearing in mind the purpose of anti-discrimination laws, and then to consider whether any limitation on that right is justified. He states that this preference is based in its accord with the spirit and purpose of the Bill of Rights (and, I would suggest, with the spirit and purpose of human rights legislation generally). It is better conceptually to start with a more widely defined right and legitimise or justify a restriction if appropriate, than to start with a more restricted right.⁴⁵

Tipping J holds that, because the meaning of marriage is so clearly understood, the Marriage Act 1955 is not capable of being interpreted to include same-sex couples. While not expressing disagreement with Tipping J's ultimate finding on the question of the interpretation of the Marriage Act 1955 and whether or not it is possible to interpret the Act inclusively of same-sex couples, there are a couple of technical points from Tipping J's judgment about which I would also like to make comment:

- (a) The Marriage Act 1955 provides that, during the marriage ceremony, each party to the marriage must say to the other: "I, AB,

⁴⁴ Quilter v Attorney-General [1998] 1 NZLR 523: 572: The New Zealand Bill of Rights Act 1990: s.4 provides:

4. Other enactments not affected – No court shall, in relation to any enactment (whether passed or made before or after the commencement of this Bill of Rights), –
(a) hold any provision of the enactment to be impliedly repealed or revoked, or to be in any way invalid or ineffective; or
(b) decline to apply any provision of the enactment –
by reason only that the provision is inconsistent with any provision of this Bill of Rights.

⁴⁵ Quilter v Attorney-General [1998] 1 NZLR 523: 576.

take you, CD, to be my legal wife (*or husband*), **or words to similar effect**”.⁴⁶ I disagree that the words “... or words to similar effect” cannot reasonably be interpreted to permit a male to say these words to a male partner. If Parliament were to legislate for the inclusion of same-sex couples within the provisions of the Marriage Act 1955, there would be no practical need to amend this section to cater for male-male marriages, or female-female marriages. This section of the Act is **capable** of being interpreted consistent with the Bill of Rights Act 1990 – it is the traditional meaning of the word “marriage” which is stopping it from being interpreted that way.

- (b) Tipping J also states that the intending parties to a marriage must make a statutory declaration in which they state that there are (1) no impediments under s.15, and (2) there is no other lawful impediment to their marriage. Tipping J then goes on to compare this with bigamous marriages, relying on the common law meaning of marriage to justify the exclusion from marriage of a person who is already married. In fact, there are two statutory provisions, in New Zealand law, relating to bigamy. Firstly, a person does not have the capacity to consent to a marriage if they were already married at the time of the second marriage ceremony, and any marriage where this is the case will be declared void *ab initio*.⁴⁷ Secondly, special provision is made for bigamous marriages from outside of New Zealand. This is a statutory provision which at least implies that bigamous marriages cannot be solemnised under New Zealand law.⁴⁸ In this respect I submit that Tipping J’s argument, on this specific point, is invalid. In fact, there is no similar provision excluding same-sex marriages, so this point could be interpreted to say the opposite to what Tipping J is attempting to say. That is, if there is an express exclusion of bigamous marriages

⁴⁶ Marriage Act 1955 s.31(3). (Emphasis added).

⁴⁷ Family Proceedings Act 1980 s.31(1)(a).

⁴⁸ Family Proceedings Act 1980 s.2:

“Marriage” includes a union in the nature of marriage that –

(a) Is entered into outside New Zealand; and

(b) Is at any time polygamous, –

where the law of the country in which each of the parties is domiciled at the time of the union then permits polygamy.

under New Zealand law (on public policy grounds), but there is not an express exclusion of same-sex marriages, surely this would suggest that an inclusive interpretation of the Marriage Act would permit same-sex couples to marry.

Justice Thomas

The decision of Justice Thomas (Thomas J) is the most favourable for same-sex couples, and, of course, is that with which, as same-sex couples advocating access to marriage, we agree the most. Thomas J approaches the issue in a logical and coherent manner, addressing it in the following stages:

- (i) Is the denial of access by same-sex couples to the Marriage Act 1955 *prima facie* discriminatory against gays and lesbians?
- (ii) If so, is that *prima facie* discrimination objectively justifiable?
- (iii) If yes, there is no need to consider this matter further.
- (iv) If no, is it possible to interpret the Marriage Act 1955 in a manner so as to include same-sex couples?
- (v) If yes, then the Court must declare this to be so.
- (vi) If no, what remedy can the Court grant?

In following this process, Thomas J considered that:

[h]aving regard ... to the essential thrust of these appeals ... it would be unduly legalistic to rest the Court's decision on the meaning of the marriage Act without squarely confronting the question of discrimination.

Is the denial of access by same-sex couples to the Marriage Act 1955 prima facie discriminatory against gays and lesbians?

Thomas J found that the exclusion of same-sex couples from access to

the Marriage Act 1055 is prima facie discrimination based **both** on sex **and** sexual orientation.⁴⁹

Whether one adopts the approach urged upon the Court by [the Plaintiffs' counsel, that the female applicant is discriminated against on the grounds of her sex because, being female, she is by law unable to marry another woman], or focuses on the [Plaintiffs' rights as a couple, the discrimination fairly can be said to be based on their sex. Whatever hesitation may exist to basing the discrimination on the grounds of sex, one cannot seriously resist the proposition that gays and lesbians are discriminated against on the ground of sexual orientation. Just as the sexual orientation of heterosexual men and women leads to the formation of heterosexual relationships, so too it is the sexual orientation of gays and lesbians which leads to the formation of homosexual relationship. Sexual orientation dictates their choice of partner in both cases.

He went on to hold that this prima facie discrimination “cannot be qualified by reference to s.5”,⁵⁰ the justification provision of the Bill of Rights Act. In particular, he rejected the view that “procreation is the sole or major purpose of marriage ... [T]he essence of the marriage relationship [is instead] cohabitation, commitment, intimacy, and financial interdependence”.⁵¹ He also rejected the “circular and question-begging” argument “that gay and lesbian persons are not discriminated against because they are free to marry persons of the opposite sex”,⁵² and warned of “the danger of looking to the past to determine whether discrimination exists today”.⁵³

He concluded that the exclusion of same-sex couples from marriage “inescapably judges them less worthy of the respect, concern and consideration deriving from the fundamental concept of human dignity underlying all human rights legislation”.⁵⁴

⁴⁹ Quilter v Attorney-General [1998] 1 NZLR 523: 536-537.

⁵⁰ The New Zealand Bill of Rights Act 1990 s.5 contains the “justified limitations” provisions.

⁵¹ Quilter v Attorney-General [1998] 1 NZLR 523: 547.

⁵² Quilter v Attorney-General [1998] 1 NZLR 523: 537.

⁵³ Quilter v Attorney-General [1998] 1 NZLR 523: 550.

⁵⁴ Quilter v Attorney-General [1998] 1 NZLR 523: 555.

If it were not for his inability to strike down clear but discriminatory legislation, because of s.4 of the Bill of Rights Act, he might have found for the Plaintiffs. In the final analysis, he held that, despite having found that exclusion of same-sex couples from marriage is unjustifiably discriminatory, the Court cannot change the law, and must defer in this function to Parliament.

The Reasoning

From the time the decision from Quilter was handed down, it was clear that Thomas J had offered something positive and insightful. His decision is one of those pieces of writing that, every time it is read, offers up something new. After having read decisions from other overseas jurisdictions, I have come to appreciate the detail in the information, the intricacy of application, and the depth of understanding that is present within this judgment. It is quite remarkable that over ten years in the past, Thomas J was writing a legal dissertation about same-sex marriage that would hold its own as a judgment in a court to this day. What is exemplary about the judgment of Thomas J is that it does not merely address the issues in a formulistic and detached manner, but that it goes beyond the technical framework and examines the detail behind the issues of what is marriage as a fundamental right and what are the implications of exclusion for gays and lesbians, what is the purpose of having human rights laws and the anti-discrimination provisions, and he touches on what he considers to be the role of those involved in human rights law.

Contained within the judgment are some points of wisdom which I list here in the hope that they continue to resonate in discussions on this topic.

Thomas J addresses the question of discrimination by reference to General Comment 18 on Non-Discrimination (37th Session, 9 November

1989) by the United Nations Human Rights Committee. This tells us that:⁵⁵

‘discrimination’ ...should be understood to mean any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.

What does Thomas J himself say about discrimination? He raises a series of extremely pertinent points in relation to discrimination, as follows:

1. Discrimination and international law – While cautioning that international human rights laws per se are not binding within New Zealand, Thomas J talks of the assistance that can be provided by them in the interpretation of domestic human rights law:⁵⁶

None of the principles ... are binding on New Zealand Courts. They do, however, ‘paint a backdrop against which New Zealand’s obligations and compliance can be placed’.

2. Concern, respect and consideration – Thomas J draws on Andrews v Law Society of British Columbia and the notion of persons being worthy of “concern, respect and consideration”.⁵⁷ According to Thomas J, this notion is anchored in the ideal that everyone is equal before the law – entitled to equal treatment under the law and to the equal protection and equal benefit of the law – requiring:⁵⁸

the promotion of a society in which all individuals are secure in the knowledge that they are recognised in law as human rights equally deserving ‘of concern, respect and consideration’, ... and ... a commitment to the recognition of each person’s individual worth regardless of individual differences.

⁵⁵ Quilter v Attorney-General [1998] 1 NZLR 523: 531.

⁵⁶ Quilter v Attorney-General [1998] 1 NZLR 523: 531: citing Cartwright J in Northern Regional Health Authority v Human Rights Commission (1997) 4 HRNZ 37: 56-59.

⁵⁷ Andrews v Law Society of British Columbia and the notion of persons being worthy of “concern, respect and consideration”.(1989) 56 DLR (4th) 1: 15.

⁵⁸ Quilter v Attorney-General [1998] 1 NZLR 523: 531-532.

3. Idealism – The ideal (that everyone is deserving of equal treatment under the law) may never be achieved, but that is:⁵⁹

... no sound reason for not pursuing it. It remains the goal and serves to enlighten the laws enacted by Parliament and the interpretation of the law adopted by the Courts.

4. Tolerance – Thomas J also raises the issue of tolerance, and then discounts tolerance as being an insufficient level of recognition to avoid discrimination, stating that “much more than tolerance from the majority is needed”.⁶⁰ He goes on to say that:⁶¹

[d]iscrimination must be positively targeted by the law. It is for this reason that Parliament enacted the Human Rights Act and affirmed in the Bill of Rights that the right to freedom from discrimination is a fundamental right to be protected and promoted in this country.

5. Discrimination and tradition – He also discusses the suggestion that, because different treatment may have an historic origin, this should not be used as a justification for its continuance. Rather, it illustrates, all the more, the reasons why that different treatment should cease.⁶²

6. Equality of treatment versus equality of result – Thomas J points out that, in some circumstances, there may be a need for unequal treatment in order to produce an equal result. A prime example of this is the sometime need for affirmative action. He goes on to quote Egan v Canada saying:⁶³

[t]he existence of discrimination or otherwise can only be determined by ‘assessing the prejudicial effect of the distinction against ... the fundamental purpose of preventing the infringement of essential human dignity’.

⁵⁹ Quilter v Attorney-General [1998] 1 NZLR 523: 531.

⁶⁰ Quilter v Attorney-General [1998] 1 NZLR 523: 532.

⁶¹ Quilter v Attorney-General [1998] 1 NZLR 523: 532.

⁶² Quilter v Attorney-General [1998] 1 NZLR 523: 532.

⁶³ Quilter v Attorney-General [1998] 1 NZLR 523: 532: citing Egan v Canada (1995) 124 DLR (4th) 609: 676.

7. Justification – Thomas J does not just find that there is no objective justification for the exclusion of same-sex couples from marriage – he finds that there **can be** no objective justification:⁶⁴

Differentiations that are discriminatory cannot be reconciled with the democratic ideal of equality before and under the law. Discrimination in all its forms is odious.

8. Effect of discrimination – He also states that discrimination against a person or a group of persons is not only detrimental to that person or group of persons, but also it is detrimental to society as a whole:⁶⁵

It is hurtful to those discriminated against and harmful to the health of the body politic. As such, it is or should be repugnant in a free and democratic society.

9. Interpretation – Thomas J agrees with the Plaintiff that the New Zealand Bill of Rights Act s.6 places the onus on the Court to give, wherever at all possible, a meaning to legislation that is consistent with the Bill of Rights:⁶⁶

*I agree that where a breach of a fundamental right or freedom enshrined in the Bill of Rights is found to exist in any statute the Court should **conscientiously strive** to arrive at a meaning which will avoid that breach. ... this Court has constructed a comprehensive and far-reaching jurisprudence designed to protect the rights of those persons who are suspected of an offence or arrested and charged with a crime. It behoves the Court to demonstrate the same commitment to the promotion and protection of other rights and freedoms equally affirmed as fundamental in the Bill of Rights.*

10. Political pragmatism – This leads on to Thomas J considering the respective roles of the human rights lawyer and the politician. It is my strongly held belief that human rights lawyers can and must advocate full equality under the law. Human rights laws cannot permit such a thing as partial equality. Parliament, however,

⁶⁴ Quilter v Attorney-General [1998] 1 NZLR 523: 540.

⁶⁵ Quilter v Attorney-General [1998] 1 NZLR 523: 540.

⁶⁶ Quilter v Attorney-General [1998] 1 NZLR 523: 541.

stands supreme and can establish its own processes and legislation which may subsequently be open to challenge through legal avenues. The processes that Parliament uses to achieve its law changes can only be decided upon by politicians, guided by jurists only to the extent that the law permits:⁶⁷

Inevitably the jurist is led into areas of policy such as the timing of any change to the law, the methods by which the law should be changed, and the general acceptance or receptiveness of the community to any such law change. At once the jurist will appreciate that he or she has strayed beyond the bounds of legal inquiry into the foreign territory of 'political policy'.

11. Populist opinion – Another point about which I feel very strongly is that of the role of popular opinion in the decision-making process. If a core purpose for the existence of human rights laws is to protect minority / vulnerable groups against the majoritarian prejudice of the larger / more powerful group(s), why then would we seek the opinion of that larger / more powerful group about what rights and protections they think the protected group should have?:⁶⁸

Fundamental rights and freedoms are not a matter of consensus. A majoritarian notion of 'morality' is not a sufficient basis to deny an unpopular minority the equal protection of the law. Indeed it is because they are a minority and likely to be politically powerless that they require the protection of the law and equal treatment under the law. The majoritarian approach was rejected by the Supreme Court of the United States in Bowers v Hardwick ...

Perhaps the most striking feature of Thomas J's judgment is his awareness of the legal consequences to gays and lesbians of exclusion from marriage, and the effects of those legal consequences on the dignity of gays and lesbians as persons:⁶⁹

Based upon this personal characteristic, gays and lesbians are denied access to a central social institution and the resulting status of married

⁶⁷ Quilter v Attorney-General [1998] 1 NZLR 523: 545.

⁶⁸ Quilter v Attorney-General [1998] 1 NZLR 523: 545.

⁶⁹ Quilter v Attorney-General [1998] 1 NZLR 523: 537.

*persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. **In a real sense, gays and lesbians are effectively excluded from full membership of society**". (Emphasis added)*

Summary

After being heard by the High Court and then by the Court of Appeal, the Quilter case established that, in the eyes of those Courts, the Marriage Act 1955 could not be interpreted to include same-sex couples.

This was not necessarily because of the language of the Act itself, but because of the well-established meaning of the term "marriage". The Courts considered that the meaning of marriage, confined to a partnership between a man and a woman, is the meaning that is widely accepted by society, and the meaning that was in the minds of Parliament at the time the Marriage Act 1955 became law.

I would suggest that the Court of Appeal majority decision on this point (the issue of interpretation), is only correct by virtue of the existence of Schedule II to the Act which is sufficiently gender-specific in its language to negate the possibility of the seemingly gender-neutral language in the remainder of the Act. Without that Schedule, it would seem quite clear that the Marriage Act 1993 **could be interpreted to include same-sex partners** and therefore, in response to the New Zealand Bill of Rights Act 1996, would have to be.

We attempted to argue in Court that the Crown's arguments all related to the "tail-wagging-the-dog". We responded with a range of counter-arguments such as:

1. We are only interested in the eligibility provisions of the Act – we need to get in before we can worry about the effect of procedures and restrictions.

2. Statutory interpretation dictates that you look first to the immediate provision, and only turn to other parts of the Act (such as a Schedule) where there is an ambiguity of language in that provision.
3. Statutory interpretation dictates that you look first to the immediate provision, and only turn to other related statutes (statutes in *pari materia*) where there is an ambiguity of language in that provision.
4. Even where there appears to be gender-specific language, it is possible to employ the Acts Interpretation Act 1924 s.4 to include female meaning where the language of the act related to the male meaning only, and vice versa.⁷⁰

We were unsuccessful on this issue, however, and the Court held that the meaning of the Marriage Act 1955 – based on the language of the Act, and the traditional and generally understood and accepted meaning of marriage within society – is clear and cannot be interpreted by the Court to include same-sex couples. They went on to say that any change to the Marriage Act must be made by Parliament.

Postscript

Putting the record straight: Court of Appeal and “discrimination”

It is my contention that the matter of the Court of Appeal on discrimination has been widely misinterpreted. It has been said that the Court held that the exclusion of same-sex couples from the Marriage Act 1955 is not discriminatory. I do not accept that, in fact, this is what the Court found. If the tools of case-law reasoning are applied correctly to the decision, it is clear that the discussion of discrimination by three of the Justices involved falls into obiter dicta, at best.⁷¹ In fact, the three of

⁷⁰ The Acts Interpretation Act 1924, in force at the time of Quilter, has subsequently been repealed and replaced by the Interpretation Act 1999.

⁷¹ “Obiter dictum [Latin: a remark in passing] Something said by a judge while giving a judgment that was not essential to the decision in the case. It does not form part of the ratio decidendi of the case and therefore creates no binding precedent, but may

them essentially dismiss the discrimination issue as being irrelevant to the case. (They do not say that discrimination is irrelevant, only that because of their particular approach to the case, the need to consider the discrimination issue was circumvented).

Richardson P, makes absolutely no determination as to whether or not exclusion of same-sex couples from marriage is discriminatory, saying:⁷²

... it is unnecessary to determine the difficult and complex question of the meaning of discrimination under international human rights instruments and New Zealand law. However ... I record that ... I am not persuaded that the right under s 19 of the New Zealand Bill of Rights Act 1990 to freedom from discrimination requires equal legislative recognition of heterosexual and same-sex marriages.

After having considered the meaning of the Marriage Act 1955 and whether it is possible to interpret it to include same-sex couples, Gault J states:⁷³

The Marriage Act is clear and to give it such different meaning [to include same-sex couples] would not be to undertake interpretation but to assume the role of lawmaker which is for Parliament. ... No further comment is necessary to dispose of the appeal ...

This is not to say that Gault J does not go on to discuss the notion of discrimination, but it is not a consideration in his decision. This means that the consideration of discrimination by Gault J can only be given the status of obiter dicta.

Keith J, similarly, stated that the negative answer on the interpretation question made it unnecessary to decide the discrimination question:

In this judgment I do no more than hint at possible positive elements of the right to freedom from discrimination, since I am principally concerned with the negative proposition, that s.19 does not reach the matter of same-sex marriages.

be cited as persuasive authority in later cases”: A Concise Dictionary of Law, Oxford University Press, Oxford (1990).

⁷² Quilter v Attorney-General [1998] 1 NZLR 523: 526.

⁷³ Quilter v Attorney-General [1998] 1 NZLR 523: 526.

Tipping J states:⁷⁴

I would not shrink from a firm decision on the issue of discrimination if such were necessary to decide this case, but it is not. However ... I think it is appropriate to express my views.

The relevant section of Thomas J's judgment for the purpose of this discussion is as follows:⁷⁵

It would be possible in deciding the appeals to leave the question of discrimination open and move directly to the terms of the Marriage Act 1955. I cannot accept that such an approach is appropriate. The only reason these appeals have arisen is because the appellants contend that they are subject to discrimination contrary to s.19 of the Bill of Rights. Unless and until that issue is resolved the question of the interpretation of the Marriage Act does not arise at all. Having regard, therefore, to the essential thrust of these appeals I consider it would be unduly legalistic to rest the Court's decision on the meaning of the Marriage Act without squarely confronting the question of discrimination.

It is possible to interpret this paragraph by Thomas J either way when trying to decide whether his considerations of discrimination amount to obiter or ratio. On the one hand, with a sentence such as: "It would be possible [to] in deciding the appeals to leave the question of discrimination open and move directly to the terms of the Marriage Act 1955", it would appear that the considerations of discrimination are obiter. On the other hand, however, the sentence: "Unless and until that issue is resolved the question of the interpretation of the Marriage Act does not arise at all" indicates that the consideration of discrimination is an integral component of Thomas J's reasoning (part of the ratio).

Over all, therefore we have two possible ways of viewing the final outcome of the case, which are as follows:

1. There are five judgments in which the considerations with regard to the question of discrimination are classified as obiter. In each of these judgments, the deliberations could be used in future cases as

⁷⁴ Quilter v Attorney-General [1998] 1 NZLR 523: 575.

⁷⁵ Quilter v Attorney-General [1998] 1 NZLR 523: 528.

persuasive argument. If each of these arguments were to be put forward, I would suggest that an argument based in the discussion by Thomas J, supported perhaps in part by that of Tipping J, would prevail over any argument derived from the discussions by Gault J and Keith J.

2. The other way of viewing the judgments is that there are four in which the discussion about discrimination is classified as obiter, and one (that of Thomas J) which is classed as part of the ratio. However, in Thomas J's case, this would be part of the ratio of the dissenting judgment – so once again may only be classed as persuasive, albeit slightly more persuasive (by virtue of being part of the ratio) than the obiter of his colleagues.

Whatever the preference of the above two possible scenarios, it is not possible to say that the Court of Appeal in Quilter found that there is no discrimination arising from the exclusion of same-sex couples from marriage. However, if we follow the ratio of the case (as binding) and the obiter of the case (as persuasive), it is my contention that we have a Court which is saying:

1. The meaning of the Marriage Act is clear; and
2. that meaning does not include same-sex couples; and
3. the Court is not able to change that meaning; because
4. it is the role of Parliament to change legislation; however
5. to exclude same-sex couples from marriage is discriminatory;⁷⁶
therefore
6. the law should be changed; and
7. it should be changed in such a way that same-sex couples are included in marriage.⁷⁷

⁷⁶ Quilter v Attorney-General [1998] 1 NZLR 523: 539 (per Thomas J).

⁷⁷ Quilter v Attorney-General [1998] 1 NZLR 523: 554: per Thomas J.

NEW ZEALAND – THE LEGISLATURE AND SAME-SEX COUPLES

Introduction

In terms of what was happening in New Zealand outside of the courts, in many ways, the period from 1993 to 2000 could be described as a period of inaction.

As was discussed in the previous chapter, the New Zealand Bill of Rights Act 1990 had been initiated by a Labour Government, but was subsequently passed during the time of a National Government. It is probably fair to say that, in general terms, the legislation had the support of both main parties within the House, but the National Government was much more reticent about giving the Act too much status and too much power.⁷⁸ The legislation was not entrenched and was not supreme law – it was ordinary legislation. The New Zealand Bill of Rights Act 1990, which applied to actions by and on behalf of Government, did not, at the time of passing, include prohibitions against discrimination on the basis of sexual orientation.

The Human Rights Act 1993 had also come into effect during the term of a National Government. The Act was not entrenched and was not supreme law – it was ordinary legislation. The Human Rights Act 1993 regulated relationships between citizens in their private lives and did include sexual orientation as an expressly prohibited ground of discrimination. The Human Rights Act 1993, by way of consequential amendment to the New Zealand Bill of Rights Act 1993, added to the New Zealand Bill of Rights Act s.19 all ‘new’ grounds now included in the Human Rights Act 1993.

The National-led Government remained in power until 1999. Unfortunately, however, in spite of what appeared to be strong human rights legislation, this did not translate into a period of human right responsiveness. In fact, it appeared that there was a lack of Governmental and Parliamentary commitment to human rights

⁷⁸ See discussion in Chapters 6 and 10 relating to the development and passing of the New Zealand Bill of Rights Act 1990 and the original proposal to have a Bill of Rights which was entrenched and had superior power.

imperatives generally, and a clear reticence in relation to gay and lesbian issues in particular.

In one sense, there seemed to be quite a lot happening, as will be shown in this section. However, a closer look will show that while there was considerable discussion of principles, there was very little movement in relation to substance. In fact, it would appear that the Government worked extremely hard to maintain the status quo in relation to gay and lesbian issues – in spite of some fine-sounding rhetoric.

First steps

Above all, the period from 1993 to 2000 seems to have demonstrated a reluctance on the part of Government and Parliament to increase the levels of protections to those minorities whom the human rights legislation now purported to protect. This translated into a seeming reluctance to increase the rights or entitlements of non-marriage partners (whether same-sex or different-sex).

What has been apparent is that progressive Parliaments have found it easier, politically, to legislate in areas which result in an increase in Government revenue or a decrease in Government expenditure. Following an Australian case in February 1996 in which a lesbian co-parent was found liable for payment of child support for her former partner's two children, it was commented that:⁷⁹

The law will be much more willing to move on the obligations ... as the rights are not where the revenue is.

It took about three years longer than in Australia, but the obligation of liability for child-support payments by lesbian co-parents was confirmed in New Zealand in 1999, well before any formal recognition was granted to same-sex couples and before access rights were granted for on-going contact between children and their separated co-parents.⁸⁰ Even prior to that, the very same lesbian parent who was to be held liable for child

⁷⁹ "Woman And Wife", Sarah Stuart, Sunday Star-Times (25 February 1996): quoting Ruth Busch (then) Senior Lecturer at University of Waikato School of Law.

⁸⁰ Liability, under the Child Support Act 1991, for same-sex partners to pay child support was confirmed in: A v R [1999] NZFLR 249.

support payments as a step-parent, had been denied the right to adopt one of the children she co-parented while she and the birth mother were a couple.⁸¹

Parliaments also appear more willing to legislate to protect the rights of individuals in a relationship one against the other. For example, legislation is more likely to be passed where:

- (a) it relates to financial matters, particularly with regard to the individual property rights of one partner vis-à-vis the other partner – as in property relationship or spousal maintenance legislation; or
- (b) it serves to protect a more vulnerable partner from an abusive partner – as in domestic violence legislation or harassment legislation.

Notably, however, at the point where there is a suggestion that legislation might provide a formal-legal recognition of the core relationship (in any sense approaching marriage), or the inclusion of children in same-sex families, the debate tends to turn to the potential of the legislation to undermine “sanctity” of marriage, and Parliament shies away from fully inclusive legislation.

The earliest legislation in New Zealand containing provisions relating to same-sex couples included the Electricity Act 1992,⁸² the Domestic Violence Act 1995,⁸³ the Harassment Act 1997,⁸⁴ the Accident Insurance Act 1998⁸⁵ and the Housing Restructuring (Income-Related Rents) Amendment Act 2000.⁸⁶

⁸¹ See further discussion on this matter later in this chapter.

⁸² Electricity Act 1992 s.111 included same-sex partners under the definition of “near relative” and thereby enabled one partner to do certain electrical repairs to an appliance that might be used by their partner.

⁸³ Domestic Violence Act 1995 s.2 enabled partners in same-sex relationships to access the protections extended by this legislation. It should be noted that these protections were also extended to other individuals who were living in a range of domestic situations described as “close relationships”.

⁸⁴ Harassment Act 1997 s.2 extended to existing or past same-sex partners the rights of a victim of harassment to the protection of the law. Once again, however, the protections were also extended to a wide range of persons.

⁸⁵ Until 1998, same-sex couples were not included in accident insurance legislation as the definition of “spouse” in the Accident Compensation Insurance Act 1992 included only partners “of the opposite sex” (married or de facto). The 1998 legislation amended this definition to include same-sex partners.

⁸⁶ The Housing Restructuring (Income-Related Rents) Amendment Act 2000 provided

The “Consistency 2000” Project

When the Human Rights Act 1993 came into effect, it contained ‘new’ grounds for prohibition against discrimination that had not been present in the previous Human Rights Act, including sexual orientation.⁸⁷

The new Act also contained an exceptions provision enabling the Government, in relation to actions of Government, to continue to discriminate temporarily on any of the ‘new’ grounds. A ‘sunset clause’, however, provided that this exceptions provision would expire at the end of 1999.⁸⁸ The Act also required the Human Rights Commission to report to the Government by the end of 1998 on all “Acts, regulations, policies, and practices” breaching the anti-discrimination provisions of the Human Rights Act.⁸⁹

By virtue of s.5(1)(i), (j) and (k), s.151 and s.152 of the Act, and the spirit and intent of the Act as expressed by Parliament prior its passage, the Human Rights Commission had been charged by Parliament to undertake an audit of all legislation, regulation, policy and practice of Government, and to report to the Minister of Justice, by January 2000, on which provisions were inconsistent with the non-discrimination provisions of the Human Rights Act 1993. Furthermore, the Minister was responsible for ensuring that Parliament was given the opportunity to remedy all these inconsistencies by either eliminating the inconsistency, or providing for a permanent exemption in respect of that inconsistency, by 1 January 2000. This exercise became known as the “Consistency 2000” Project.

On 27 June 1997, Paul East (Acting Minister of Justice) announced that the Government intended to call an end to the “Consistency 2000” Project, citing cost and time as reasons.⁹⁰ The Government then

that same-sex couples were to be treated in the same way as opposite-sex de facto and married couples for the purposes of eligibility assessments for income-assisted housing through Housing NZ – financial legislation, fiscally beneficial to Government rather than the couple.

⁸⁷ Human Rights Act 1993 s.21(1)(m).

⁸⁸ Human Rights Act 1993 ss.151-152.

⁸⁹ Human Rights Act 1993 s.5(1)(i), (j), (k).

⁹⁰ Harrison, Rodney, “State Planning To Exempt Itself From Laws On Rights”, New Zealand Herald (28 August 1997).

introduced the Human Rights Amendment Bill 1998 with the express intention of amending the Human Rights Act 1993 to exempt Government permanently from its anti-discrimination provisions, except in areas such as employment and access to buildings, where it would have to act in essentially the same manner as the private sector.

There was an outcry from many affected groups,⁹¹ and individuals and, as a result of public pressure, and a failure to gain support in the House, the Bill was never passed.

The Human Rights Commission went on to meet its existing statutory obligations by presenting a Report to Parliament.⁹² The Commission made it very clear in this Report that it was not satisfied with the attempt to stifle the work relating to the “Consistency 2000” Project.

Subsequent to the failed Bill before the House, and thanks to vehement opposition from many quarters as part of “a huge public response”,⁹³ the Government introduced a second Bill which passed in 1999. The Human Rights Amendment Act 1999 effectively extended the old “sunset clause” until the end of 2001. In the meantime, the work on consistency issues was seriously delayed.

The failed Human Rights Amendment Bill 1998 was highly representative of Government’s view, at that time, of the relative importance of human rights imperatives in the general legislative and constitutional schema of New Zealand.

Above all, this further delay of human rights compliance in New Zealand for a period of two years, from 31 December 1999 to 31 December 2001, exemplified a lack of commitment to an adherence to human rights principles and standards for which its citizens had battled prior to 1993. While rhetoric supported human rights standards, these standards gave way to policies of cost-cutting within the public sector, the rolling back of the State and the greater emphasis on a free-market economy. Social

⁹¹ For example, Aged Concern, Disabled Persons’ Advocacy, amongst others.

⁹² http://www.justice.govt.nz/pubs/reports/1998/hrc_consistency/index.html (Retrieved: 12 August 2009).

⁹³ Hansard, “Human Rights Amendment Bill (No.2)”, Second Reading (13 July 1999): Lianne Dalziel, New Zealand Labour, commenting that “If my mail was anything to go by, the public response was enormous”.

issues generally were failing to get traction, and this was illustrated quite clearly in this human rights area.

This attempt to side-step human rights obligations also demonstrated two very important countervailing factors.

On the one hand, because it is not entrenched, human rights legislation in New Zealand remains vulnerable to attack. When a Government is not committed to human rights protections for its citizens, and particularly when human rights legislation might be seen to come into conflict with, either actually or potentially, for example, a Government's free-market agenda, it is the human rights principles which will be called upon to give way.

On the other hand, however, this also demonstrated the importance of the presence of checks upon the excesses of the Executive. In this case, the check provided by the separation of powers worked to protect the human rights values important to many. The Executive Government's attempt to remove its temporary exemption from the Act and replace it with a permanent exemption had been thwarted by the Legislature.⁹⁴

Government received only a temporary exemption for the Human rights Act because it agreed to an overt strict and detailed contract with the people of this nation. Parliament is the guardian of that contract. I was appalled that the National Government ever proposed to breach that contract.

Relationship property legislation

Partly because of, and partly in spite of, the delays in the "Consistency 2000" Project, work was continued by various agencies in relation to various areas of the laws relating to same-sex couples. For example:

- The New Zealand Law Commission and individual members of the Commission published several papers on issues such as succession, adoption, recognition of relationships, property protections, and domestic violence.

⁹⁴ Hansard, "Human Rights Amendment Bill (No.2)", Second Reading (13 July 1999): Tim Barnett, New Zealand Labour, Christchurch Central.

- The Ministry of Justice's Discussion Paper "Same-Sex Couples and the Law" was distributed and submissions received and analysed.⁹⁵ A Report on the submissions was presented to Parliament.
- The Ministry of Justice also commenced what was to become known as the "Compliance 2001" Programme (the replacement of the former "Consistency 2000" Project).
- The Government revived earlier Bills relating to matrimonial and de facto property protections.
- Individuals and groups within the gay and lesbian communities (and their opponents) recommenced lobbying on issues such as freedom of speech, immigration and relationship recognition.

In August 1997, the New Zealand Law Commission published its Report "Succession Law: A Succession (Adjustment) Act".⁹⁶ The Commission envisaged that the proposed legislation should replace the Law Reform (Testamentary Promises) Act 1949, the Family Protection Act 1955, and the Matrimonial Property Act 1963 (provisions relating to division of property upon death of a partner).⁹⁷ Resulting from the considered work of the Commission, with "Consistency 2000" in mind, the Report recommended that the new legislation should provide for couples who are married, and couples who are not married but who are living together in a relationship "in the nature of marriage".

Although same-sex couples had previously turned to the courts for the resolution of relationship property issues in constructive trust cases,⁹⁸ neither same-sex couples nor de facto different-sex couples had been included in relationship property legislation.

For the first time, serious consideration was now being given, firstly, to the inclusion of de facto opposite-sex couples and, secondly, to the

⁹⁵ See discussion later in this Chapter.

⁹⁶ "Succession Law: A Succession (Adjustment) Act", NZLC R39 (August 1997).

⁹⁷ Note that, although the Matrimonial Property Act 1976 had been passed into law, the provisions of the 1963 Act still applied with regard to division of property upon death.

⁹⁸ For example: Hamilton v Jurgens [1996] NZFLR 350; Julian v McWatt [1998] NZFLR 257.

inclusion of same-sex couples in proposed legislation. The Law Commission had concluded that there was no practical reason why these relationships should be dealt with separately.⁹⁹ Despite this, the Prime Minister at the time announced:¹⁰⁰

Legislation on both de facto property and matrimonial property will be introduced into the house in the next 2 or 3 weeks, and sent to a select committee. It will not deal with same-sex relationships. Any member or any political party is free to amend the legislation at the Committee stage. I will be very interested to see whether any political part is prepared to move in that way, and, indeed, which members of parliament will be prepared to support that legislation. I myself will not be supporting such an amendment.

The Government persisted with the Matrimonial Property Amendment Bill 1998 which would apply to marital partners only, and the De Facto Property Bill 1998 which would codify the existing common law as it applied to de facto different-sex couples, and would not apply to same-sex couples. In line with the Law Commission's reasoning, the Ministry of Justice had advised Government that the exclusion of same-sex couples from the relationship property legislation could raise issues under the Human Rights Act 1993, but both Bills were introduced on 24 March 1998.

One commentator wrote:¹⁰¹

The law reform process ... was marked by concerns to uphold the sanctity of marriage. Same-sex rights were rejected outright on moral grounds, and heterosexual de facto couples, especially those with children, were not to be encouraged when marriage was the preferred arrangement. Subsequently, a one-Act-fits-all approach was not adopted.

Both Bills proceeded to consideration by a Select Committee and the receipt of public submissions. Submissions on the De Facto Property Bill

⁹⁹ See "Succession Law: A Succession (Adjustment) Act", NZLC R39 (August 1997): paras.19-25 and paras.66-67.

¹⁰⁰ Rt Hon Jenny Shipley, Hansard: Parliamentary Debates (24 February 1998).

¹⁰¹ Parker, Wendy, (School of Social Policy and Social Work, Massey University, New Zealand) "New Zealand Property Rights Legislation: A Changing Landscape?", paper presented at the 7th Australian Institute of Family Studies Conference: Family Futures : Issues in Research and Policy, Sydney (24-26 July 2000).

were overwhelmingly in favour of the inclusion of same-sex couples¹⁰² and, in response, a Supplementary Order Paper, prepared by the Opposition prior to the Bill's Second reading, proposed the inclusion of same-sex couples.

Both the Matrimonial property Amendment Bill and the De Facto Property Bill languished before a Select Committee for some twelve months. Subsequently, all further progress on the Bill was halted when the Minister of Justice asked his Ministry to prepare a discussion document on the issue of "Same-Sex Couples and the Law" in order to consult the public on a range of issues affecting same-sex couples.

The new Labour-led Government, elected in late 1999, was to progress this property legislation during 2000 and 2001 as an all inclusive amendment to the Matrimonial Property Act 1976.¹⁰³

Discussion Paper: "Same-Sex Couples and the Law"

In February 1999, the then Prime Minister, Rt Hon Jenny Shipley attended the HERO Parade in Auckland. She described the Parade as "a lovely event", and talked of the need for New Zealanders to celebrate their diversity. She then returned to Wellington where she confirmed that same-sex couples would not be included in the relationships property legislation about to be returned from Select Committee for consideration by the House. In a very telling way, she talked of considering the "issues surrounding the legal recognition of same-sex relationships".¹⁰⁴ This notion of 'considering the issues surrounding' – taking about three steps back from the issue itself – is a very different matter from actually confronting the issue directly.

¹⁰² The Draft Report of the Select Committee states that, of the submissions received which mentioned this issue, 87% were in favour of the inclusion of same-sex couples.

¹⁰³ See discussion later in Chapter 8.

¹⁰⁴ Brockett, Matthew, "Shipley Supports Gay Rights – Except Marriage", *The Dominion* (16 February 1999): 2. Same incident also referenced by Hon Phil Goff in *Hansard* (6 May 1998), Second Reading of the De Facto Relationships (Property) Bill and Matrimonial Property Amendment Bill: "How can we talk about tolerance for diversity on the one hand, at a parade where many gay people are present, and at the same time come into this House and decide not to give those people equal rights ...".

In August 1999,¹⁰⁵ the discussion paper “Same Sex Couples and the Law” was published and distributed by the Ministry of Justice. The paper essentially asked the public “what you think about the way our laws treat same-sex couples, and whether you think anything should change”.¹⁰⁶

In its introduction, the paper stated:¹⁰⁷

The Human Rights Act has outlawed discrimination on the grounds of sexual orientation since 1993. However, the Human Rights Act does not override other legislation. ... The Consistency 2000 project brought out a number of situations in which various New Zealand laws treated same-sex couples differently. ... This is an opportunity to think about whether we want to keep or remove some or all of these inconsistencies. ... Therefore, we seek your views to assist in providing advice that reflects the views of the community. Public discussion of the issues will also help Parliament decide how same-sex couples should be treated.

However, the paper contained no discussion about what constitutes discrimination, nor any discussion about the concepts of equality or equity. The message being conveyed seemed to be that, rather than being committed to upholding human rights standards in New Zealand and ensuring equal rights to gays and lesbians, the Government was committed to proving (to itself in particular) that it had good reason to withhold those rights. It certainly became evident that the Government was eager not to take a positive lead on rights for same-sex couples.

The Ministry’s Discussion Paper was accompanied by a “Background Paper”,¹⁰⁸ which did contain a brief section on “The Concept of

¹⁰⁵ According to the Ministry of Justice mailing list, supplied to me by the Ministry (September 1999), a media release and the discussion paper were sent out to 36 newspapers, 6 general magazines, 10 broadcast media organizations, all Government agencies, all District Courts, all Members of Parliament, the Human Rights Commission, all Law Societies and Law Centres, all Citizens’ Advice Bureaux, all Public Libraries, and all Plunket Headquarters. Media releases were also sent to a further 55 media organizations, a further 16 community organizations and all church headquarters. Two gay media organizations and 7 gay groups received the media release and the discussion paper.

¹⁰⁶ Ministry of Justice, “Same-Sex Couples And The Law”, Ministry of Justice, Wellington (1999): 1.

¹⁰⁷ Ministry of Justice, “Same-Sex Couples And The Law”, Ministry of Justice, Wellington (1999): 1.

¹⁰⁸ It is interesting to note that the Background Paper was not distributed with the Discussion Paper, but was available from the Ministry of Justice and on their

Discrimination”. In general terms, the discussion gave the impression that different treatment does not constitute discrimination if people generally think that the different treatment (that is, less favourable treatment) is acceptable. In this context, that means that it would be permissible to treat gays and lesbians less favourably if respondents generally indicated that they thought that gays and lesbians should be treated differently.¹⁰⁹

*Discussions about the legal treatment of same-sex couples often assume that different treatment equals discrimination. But it is generally accepted that, in New Zealand law and in that of comparable jurisdictions, not every difference amounts to discrimination. ... The paper makes no judgement about whether particular instances of different treatment are discriminatory. Instead, it seeks **your views** on whether these differences are unjustified and so, discriminatory. (Emphasis added)*

The New Zealand Law Commission and the New Zealand Human Rights Commission each made submissions in response to the Discussion Paper also. I have previously outlined my concerns about these submissions on several fronts,¹¹⁰ and so merely reiterate my key concern that both these institutions recommended something less than full equality under the law. The Law Commission, by means of its Study Paper, recommended a registered partnerships regime separate from marriage, and the Human Rights Commission recommended a regime “akin to marriage”.

The Law Commission recommended that, to avoid discrimination, registered partnerships should be available to same-sex couples and those different-sex couples who sought legal recognition of their

website. It would be interesting to know how many of those who received the Discussion Paper went to the trouble to obtain and refer to a copy of the Background Paper.

¹⁰⁹ “The Concept Of Discrimination” in: Ministry of Justice, “Same-Sex Couples And The Law: Background Paper”, Ministry of Justice, Wellington (1999).

¹¹⁰ See, for example: Christie, Nigel, “The New Zealand Same-Sex Marriage Case”, in: Wintemute, Robert, and Andenaes, Mads, (Eds), Legal Recognition Of Same-Sex Relationships: A Study Of National, European, And International Law, Oxford (2001) 317: 332.

relationships but did not wish to marry. The Law Commission also stated that:¹¹¹

There should be no question of registered same-sex partnerships being regarded as in any way inferior to traditional marriage. If it be necessary to afford some hierarchic ranking to the two institutions, they should rank equally.

However, the Law Commission also stated that its proposed registered partnerships regime could be seen as:¹¹²

A legal code designed to avoid giving what may be seen as gratuitous offence to those for whom matrimony is a holy estate.

From an equality perspective, this line of reasoning is wholly unacceptable and is offensive to the dignity of same-sex couples.

The Human Rights Commission's response circumvented the fundamental premise of equality under the law. The Commission outlined a range of statements which seemed to be fully in support of the notion of equality, such as:¹¹³

At this point the Commission wishes to refer again to what is seen as the guiding principle – equality before the law. Full equality favours the amendment of the Marriage Act so that same-sex couples can legally marry. Anything else can be seen as a compromise of the equality principle.

The Commission went on, however, to advocate a regime which “in all respects is akin to that of marriage” rather than marriage itself. This would suggest that the Commission is guilty of its own sin of compromising “the equality principle”.¹¹⁴

¹¹¹ “Recognising Same-Sex Relationships”, Study Paper 4, Law Commission, Wellington (NZLC SP4) (1999): 9; Recommendation in para.33.3.

¹¹² “Recognising Same-Sex Relationships”, Study Paper 4, Law Commission, Wellington (NZLC SP4) (1999): 8.

¹¹³ Human Rights Commission, “Options for Law Reform In New Zealand: The Problem Of Inequality”, <http://hrc.co.nz/index.php?=13681&id=13688&wd0=samesex&wd1=same-sex&format=> (Retrieved: 15 December 2004).

¹¹⁴ Human Rights Commission, “Options for Law Reform In New Zealand: The Problem

In response to the Discussion Paper, the Ministry of Justice received some 3546 submissions representing the views of 8464 individuals and groups. In terms of submissions from groups or organisations, by far the greater number came from Church groups (about 70%),¹¹⁵ and it is my understanding that a similar pattern was followed by individual submissions, with a significant proportion of them coming as form-letters signed by persons with very strong religious affiliations.¹¹⁶

In general, and unsurprisingly, the submissions did not favour changing the law to permit same-sex couples to marry (80% against). It is interesting to note that the main objections to same-sex couples being able to marry were founded in “social, moral and religious objections”. It is also interesting to note the terminology employed in reporting on those objections, namely, “the majority **felt** ...” and “many **believed** ...” – not seeming to reach the thresholds of objective justifications.

On the other hand, amongst the 20% who supported a change to the law to permit same-sex couples to marry, there was a consensus based in equality and human rights law – equal rights and equal treatment as equal members of society.

It is noticeable that there is a wide range of responses, and there is a high degree of contrast in the nature of many of the responses, confirming that this is a very complex area with a collection of very complex issues.

Of Inequality”,
<http://hrc.co.nz/index.php?=13681&id=13688&wd0=samesex&wd1=same-sex&format=>, (Retrieved: 15 December 2004).

¹¹⁵ “Discussion Paper: Same-Sex Couples And The Law – Summary Of Responses”, Ministry of Justice, Wellington (28 July 2000): 2.

¹¹⁶ Discussion with Ministry of Justice.

Comments were made along the following lines:¹¹⁷

TABLE 6: CONTRASTING VIEWS ON THE NATURE OF MARRIAGE	
Traditional Views	Rights-Based Views
<ul style="list-style-type: none"> • Marriage is a religious and spiritual institution rather than a secular one. 	<ul style="list-style-type: none"> • It is necessary to separate more clearly the religious and secular aspects of marriage.
<ul style="list-style-type: none"> • Marriage is God ordained. 	<ul style="list-style-type: none"> • Marriage is a civil legal estate conferred by the State.
<ul style="list-style-type: none"> • The idea of same-sex marriage is objectionable from a religious standpoint. 	<ul style="list-style-type: none"> • Same-sex marriage would be morally or religiously acceptable, and some church groups and ministers expressed unconditional support for same-sex marriages.
<ul style="list-style-type: none"> • Marriage is a moral issue. 	<ul style="list-style-type: none"> • Marriage is a rights issue.
<ul style="list-style-type: none"> • Marriage is, by definition, between a man and a woman. 	<ul style="list-style-type: none"> • The concept of marriage is wide enough to encompass relationships between same-sex couples
<ul style="list-style-type: none"> • Same-sex relationships are contrary to tikanga Māori. 	<ul style="list-style-type: none"> • Same-sex relationships have been supported in the traditional and modern Māori societies.
<ul style="list-style-type: none"> • Marriage is an outmoded and patriarchal institution. 	<ul style="list-style-type: none"> • I am not sure that I want to marry, but I am sure that I want to have the choice.
<ul style="list-style-type: none"> • The State should not give its approval to same-sex relationships. 	<ul style="list-style-type: none"> • Same-sex couples should have equal rights and be treated as equal members of society.
<ul style="list-style-type: none"> • It is not the business of the State to recognise same-sex relationships. 	<ul style="list-style-type: none"> • It is not the business of the State to deny the rights of same-sex relationships.
<ul style="list-style-type: none"> • Registration of relationships would provide a suitable alternative. 	<ul style="list-style-type: none"> • If same-sex couples cannot marry, then registration is unacceptable as a B-grade option.
<ul style="list-style-type: none"> • Would support registration only if it does not confer the same rights and responsibilities as marriage. 	<ul style="list-style-type: none"> • Would support registration only if it confers the same rights and responsibilities as marriage.
<ul style="list-style-type: none"> • Registration should apply to same-sex couples only. 	<ul style="list-style-type: none"> • Registration should be available for same-sex couples and opposite-sex couples.
<ul style="list-style-type: none"> • Registration should not provide any parental rights. 	<ul style="list-style-type: none"> • Registration should provide for the same rights and responsibilities as marriage.

¹¹⁷ "Discussion Paper: Same-Sex Couples And The Law – Summary Of Responses", Ministry of Justice, Wellington (28 July 2000).

All in all, therefore, the public consultation process through the Ministry of Justice discussion paper showed the divergence, rather than a convergence, of opinion on issue relating to the recognition of same-sex relationships.

The promulgation of the Discussion Paper reinforced the danger of consultation on issues such as how same-sex couples should be treated before and under the law.¹¹⁸ On the basis that all citizens are entitled to equal treatment before the law, on what basis can it therefore be acceptable to seek the views of the majority on how a minority should be treated – especially in the face of the enactment and implementation of substantive human rights laws.

In general terms, I would suggest, the Discussion Paper “Same-Sex Couples and the Law” was designed to gather as much public support as possible against legal recognition of same-sex relationships and their access to various entitlements.

Child Support vis-à-vis Adoption

In the 1990s, an interesting situation arose in two separate cases concerning the same lesbian family. The family consisted of a lesbian couple, who had been together since approximately 1979, and the three children, born to the relationship in about 1984, 1986 and 1988. All three children had been born to one of the partners as a result of artificial insemination.

The first case related to an application for adoption, of one of the children, by the partner of the birth-mother. The second case related to liability for child-support payments by the partner to the birth-mother after the couple has subsequently separated. In both cases the sperm donor was the same person.

The adoption application

In 1992, the partner of the birth-mother appealed to the High Court

¹¹⁸ See earlier discussion on ‘Populist Decision-Making’ in Chapter 5 above.

against an earlier refusal of the Family Court to allow her to adopt the youngest of the three children.¹¹⁹

The adoption was intended to:¹²⁰

- achieve a degree of legal equality between the two partners;
- equalisation of power between the two parents;
- provide greater security in the child's family relationships; and
- reduce the risk that the birth mother's family would try to secure custody of the child in the event that she died.

The birth-mother had fully consented to the proposed adoption, and there was no objection from the birth-father / sperm donor. A social work report favoured the adoption stating that the applicant was a fit and proper person.¹²¹

The court considered that there was no reason to suggest that the appellant would not be a fit and proper person to have the custody of the child, and that she was of sufficient ability to bring up, maintain and educate the child. There were no other impediments to her application. The court decided that the sole issue therefore was whether the welfare and interests of the child would be promoted by the adoption of his lesbian co-parent.¹²²

The court held that, on the balance, there was no significant advantage to be gained by the child, but that there would be significant disadvantage in that an adoption order would create confusion through an artificial legal relationship. Because of the effect of the Adoption Act 1955 s.16:¹²³

- the child's birth-mother would not continue to be the legal mother; and

¹¹⁹ Re an Application by T [1998] NZFLR 769.

¹²⁰ Re an Application by T [1998] NZFLR 769: 770.

¹²¹ Re an Application by T [1998] NZFLR 769: 770.

¹²² Re an Application by T [1998] NZFLR 769: 771.

¹²³ In the case, the Judge stated that it would be artificial for a child to have "two mothers", but (1) that is not an artificial concept in the Māori culture (and similarly in other cultures) where the term "whaea" is a term used to encompass mother, aunts, co-parents, etc, and (2) all adoptions have the same legal fiction. At least in this case, it was a guaranteed open adoption. Also, step-parent adoptions are very common and do not even need a Social Worker's Report (in this instance, despite not being required, a favourable Social Worker's Report was provided).

- the child's legal mother would not be the birth-mother.

The Court also considered that much of what was being sought through adoption could be achieved through guardianship orders. The appeal was dismissed, upholding the Family Court's refusal of the application.

The child support application

Subsequently, the relationship between the couple came to an end. In 1998, after the couple had separated, the birth mother made an application under the Child Support Act 1991 for payment of child support from her former partner. The Family Court held that, for the purposes of the Child Support Act 1991, the former partner was a step-parent of the three children and, on that basis, was liable for child support payments. This was the case in spite of the former partner not being defined as a step-parent under the (the) Guardianship Act 1968. The matter was appealed to the High Court.¹²⁴

Under the Child Support Act 1991, a "child" for whom child support payments are due, is defined in relation to the parents who are, in turn, defined in terms of their relationship to each other. The provisions extend to parents who are (or were) in a legal marriage when the child was born or conceived, or to whom adoption rights were granted, or natural parents of the child whose parentage is registered under the Births and Deaths Registration Act 1951.¹²⁵ The sperm donor (father) in this case could not be a liable parent under the Act because of the Child Support Act 1991 s.7(d) which exempts sperm donors from liability when children are conceived pursuant to a medical procedure.

As the Court emphasised, the Child Support Act quite clearly relates to the financial aspects of child support. The Act is not about the personal relationship between the couple, but is about:

- affirming the right of children to be maintained by their parents;¹²⁶

¹²⁴ *A v R* [1999] NZFLR 249.

¹²⁵ Child Support Act 1991 s.7.

¹²⁶ Child Support Act 1991 s.4(a).

- ensuring that equity exists between custodial and non-custodial parents in respect of the costs of supporting the children;¹²⁷ and
- ensuring that the costs to the State of providing an adequate level of financial support for children and their custodians is offset by the collection of a fair contribution from non-custodial parents.¹²⁸

In this sense, the Act is about the rights of the child, and the maintenance of the financial relationship between the liable parent and the child.

At the same time, the Court held that the Child Support Act was to be interpreted inclusively of same-sex couples, citing the following reasons:¹²⁹

The first reason is that on the proper construction of the statute, any relationship in the nature of marriage between two persons is capable of generating the status of a step parent. ...

The second reasons is that a statute should also be read as gender neutral, unless there is clear Parliamentary language to which a Court must defer. ...

The third reason for reading the statute in an inclusive manner is that the overall scheme of the Act is strongly protective of the right of children to be maintained.

The High Court held that the former partner of the children's birth mother was liable for child support payments and dismissed the appeal.

Summary

Therefore, the lesbian former partner was defined as a "step-parent" under the Child Support Act s.99, but would not be defined as a "step-parent" under the (then) Guardianship Act 1968. So, she was

¹²⁷ Child Support Act 1991 s.4(h).

¹²⁸ Child Support Act 1991 s.4(j).

¹²⁹ A v R [1999] NZFLR 249: 255. It should be noted that at the time of this decision, the Child Support Act 1991 s.2 defined 'married person' as "a person who is living with another person and who, although not legally married to the other person, has entered into a relationship in the nature of marriage with the other person". This definition no longer applies with the definition section now stating "Definition omitted".

jurisdictionally barred from seeking access for a child to whom she was paying child support. This has, of course, been changed under the Care of Children Act 2004.

What has not changed, however, is the ability of same-sex couples to adopt as a couple. That is, in the instance above, if the applicant mother had been successful in adopting the child she sought to adopt, the legal tie between the child and the birth-mother would have been severed. There is no provision in New Zealand, as there is in some other countries,¹³⁰ for one partner to become the parent of the child of the other partner through adoption – without severing the legal ties with the first parent. Nor is there any ability for same-sex couples to adopt jointly.

The messages

There are three key messages here – not all of which are consistent with each other.

First, the Court is saying that the Child Support Act 1991 has been crafted by Parliament in such a way that it is inclusive of same-sex relationships. That is, to some degree, this case is about the recognition of same-sex relationships and the recognition of same-sex families and the interdependencies of members of those families. As Hammond J states:¹³¹

Thus, although the adult populace may well be left to differ sharply on what kind of interpersonal relationship will be sanctioned, and to what extent, as marriages, Parliament has clearly chosen in this statute to solidly endorse the notion that the parties to a “relationship in the nature marriage” (however, constituted) have an unequivocal obligation to materially support the children of such an enterprise.

Second, the Court is saying that a same-sex partner will be liable for child support payments when a relationship between partners who have been parenting children together comes to an end.

¹³⁰ For example, in Denmark, Sweden, Iceland (as a result of registered partnerships / civil union), and Canada (as a result of equal marriage), amongst others.

¹³¹ A v R [1999] NZFLR 249: 255.

This approach coincides with the view expressed above that Parliaments tend to legislate obligations before entitlements, and for issues relating to revenue rather than expenditure, unless there is some overriding principled policy at stake.

Thus, the obligation for a liable parent to pay child support can be seen as a conscious acknowledgement by our Parliament of the existence of same-sex families for acknowledgement sake. Or, it can be seen as Parliament extending the net with which it will capture some of the funds that will assist in offsetting the cost of providing financial support to single parent households. As Hammond J states:¹³²

The economic “costs” of the lack of adequate material support for, and undersocialisation of, a distinct segment of the nation’s children is very high. Amongst other things it is reflected in the demand for social services, psychiatric assistance, drug and alcohol rehabilitation, crime prevention, law enforcement, and like matters. These costs are rising, in some cases sharply.

In this same vein, the Court goes on to state:

There is too, the moral concern that individuals should take responsibility – where they can properly be asked to do so – for the burden of supporting “their” children.

There can be no issue with the expectation that “individuals should take responsibility for the burden of supporting ‘their’ children”. In my view, however, issue can be taken with the expectation that individuals (and couples) should take responsibility for their burdens, but not receive access to the same level of recognition and privilege that is available to others. That is, same-sex couples should not be expected to accept all the obligations that are applied to different-sex couples unless they too are provided with access to the same status and entitlements, at least the right to apply for access to the child for whom you are paying child support.

¹³² A v R [1999] NZFLR 249: 256.

Third, the Court is saying, on the one hand:

- we will not, in the best interests of the child(ren), respect your desire to cement your legal parental relationship with your child in the manner you, as a same-sex family, consider to be most beneficial to yourselves and your children – that is, by way of adoption.

But, on the other hand, a second Court is saying:

- we will declare you to be a step parent of the children, and enforce your obligations to pay, as a liable parent, the child support payments that are due as a result of the Child Support Act 1991.

The Judge clearly sees this as a “win” for the recognition of diverse family units. But, in the context of the decision under the Adoption Act 1955 (discussed later in this chapter) and the jurisdiction bar that existed under the Guardianship Act 1968, do these proceedings represent a “win” for same-sex individuals or relationship, or is it merely a further decision placing obligations on same-sex partners? What is even worse here is that the co-parent’s application for adoption and her Guardianship Order (which was subsequently vacated) were used by the Court to decide that she was a “step-parent” under the Child Support Act 1991.

Summary

There are some areas where I consider that the New Zealand Parliament has conveyed mixed messages to society generally about the worth of gays and lesbians, and of same-sex couples.

On the one hand, we are told that gays and lesbians are treated very well under New Zealand law – and maybe this is a justifiable view in some respects. On the other hand, however, it can be argued that our Parliament sets different standards for the citizens of New Zealand in relation to their behaviour towards gays and lesbians than it is prepared to adhere to itself.

This can be viewed a little like the adage with regard to parents who demonstrate behaviour different from that they expect from their children – “Do as I say, not as I do!”. This adage is demonstrated in reality with regard to the inherent contradictions in the above issues.

In 1990 and 1993, the New Zealand Parliament passed the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. These two pieces of legislation together provided for the protection to citizens of New Zealand from discrimination in both the public and private spheres – that is, between the individual and the State, and between individuals.

In the face of that seemingly strong human rights climate, however, Governments have failed to respond with act.

First, there was an attempt by the Government to step away from its commitments with regard to “Consistency 2000”. It was suggested that the Government should be permanently exempted from compliance with non-discrimination standards except where the State operated in the same way as the private sector.

Second, the Government demonstrated a great deal of resistance with regard to extending equal relationship property rights. The Government expressed its preference that matrimonial property should be dealt with separately from de facto property, “marked by concerns to uphold the sanctity of marriage”.¹³³ Further, the Government declared that, while it would propose separate legislation for de facto (different-sex) couples, same-sex couples would not be included in that legislation.

Third, the Government entered into a phase of public consultation – a flawed approach, in my view, to human rights issues. Apart from the fact that the Discussion Document issued by Government for public consultation ruled out the possibility of marriage as a form of relationship recognition, the notion of seeking majority opinion on the treatment of minority groups is an anathema to the principles of human rights.

¹³³ Parker, Wendy, (School of Social Policy and Social Work, Massey University, New Zealand) “New Zealand Property Rights Legislation: A Changing Landscape?”, paper presented at the 7th Australian Institute of Family Studies Conference: Family Futures : Issues in Research and Policy, Sydney (24-26 July 2000).

Mixed messages are also conveyed through the above cases relating to adoption and child-support. While it is pleasing that, since those cases, there have been significant changes aspects of guardianship through the Care of Children Act 2004, there have still been no changes to the Adoption Act 1955.¹³⁴ The fact that different legislation on related issues (family, parenting, guardianship) can be interpreted in such contrary manner suggests that they are not based in consistent principle.

Conclusion

As stated above, while it appeared that there was a reasonable amount happening in the period from 1993 to 2000, closer examination suggests that there was more resistance than forward movement.

On the one hand, the same-sex marriage case brought the issue of recognition of same-sex couples to public attention and into public debate. On the other hand, in the final analysis, the case before the courts was unsuccessful.

On the one hand, 'Consistency 2000' brought public attention to the changes to human rights legislation and the comfort of New Zealand's now express commitment to equality and fairness. On the other hand, Government:

- sought the means of releasing itself from its consistency and compliance obligations;
- sought the opinion of the majority of New Zealanders about how gay and lesbians (as a minority) should be treated by the law; and
- sought ways of not providing the same level of relationship property protections for married, different-sex de facto couples and same-sex couples

¹³⁴ See further discussion on the Adoption Act 1955 in Chapter 8.

OVERSEAS JURISDICTIONS

Canada

Contrary to the New Zealand situation, there were some major steps forward in Canada stemming from the outcome of some key cases. The early cases were not about same-sex marriage itself, but it was the outcome of these cases that enabled the cases on marriage to be taken to the courts, and for the courts to make the decisions they did.

Sexual orientation included in the Charter

In 1995, Egan v Canada, was heard by the federal Court of Appeal.¹³⁵ Egan and his partner had lived together as a couple for 45 years, and the case related to a claim for superannuation payments to Egan, as a retiring employee, and his same-sex “spouse”.

The outcome of this case was of general significance for same-sex couples across Canada as the Court held that same-sex couples are protected by the non-discrimination provisions of s.15 of the Charter.

The outcome of the case was of particular significance to Egan and his partner as the Court held that the different treatment in this instance did not infringe upon the s.15 requirements, but even if it had, such infringement would be justifiable in terms of s.1 of the Charter. For these reasons, the right to be recognised as spouses did not extend to same-sex couples.

The first element of the case was significant because, prior to this point, sexual orientation was not a protected ground under the Canadian Charter of Rights and Freedoms. However, Egan v Canada, the Supreme Court of Canada ruled that sexual orientation is an analogous ground under s.15(1) and that, as a result of that, discrimination on the ground of sexual orientation is unconstitutional.¹³⁶ The inclusion of sexual

¹³⁵ Egan v Canada [1995] 2 S.C.R. 513.

¹³⁶ Note that, in 1989, the Supreme Court of Canada had confirmed that the term “in particular” is the crucial term permitting the inclusion of grounds other than those listed expressly in the section, but had not confirmed ‘sexual orientation’ as an

orientation as has been affirmed subsequently in other cases,¹³⁷ and there is now no doubt that sexual orientation is a prohibited ground under the Charter and the federal Human Rights Act, and provincial human rights legislation.

The advantage for same-sex couples in Canada, and for the future of litigation for access to marriage, Canada now not only had supreme constitutional law, but also had supreme constitutional law that included protections against discrimination on the basis of sexual orientation.

Entitlements associated with marriage – M v H

Perhaps the most resounding ‘pre-marriage’ success came on 20 May 1999 when, in M v H, the Supreme Court of Canada upheld the earlier decision of the Ontario Court of Appeals that Ontario’s Family Law Act (FLA) s.290 was unconstitutional and that, unless the legislation was amended within a year, the Court would:¹³⁸

- (a) *make a declaration that the definition of spouse contained in s.29 of the FLA is of no force or effect to the extent that it excludes same-sex couples;*
- (b) *make a declaration that the words “a man and woman” be severed from the definition of “spouse” in s.29 of the FLA; and*
- (c) *make an order reading in the words “two persons” instead of “a man and woman” into the definition of “spouse” contained in s.29 of the FLA.*

As a consequence of this decision, on 27 October 1999, the Ontario legislature enacted the Modernization of Benefits and Obligations Act:

An Act to amend certain statutes because of the Supreme Court of Canada decision in M v H.

analogous ground: Andrews v Law Society of British Columbia [1989] 1 S.C.R. 143.
¹³⁷ Veysey v The Commissioner of Correctional Services (1990) 29 F.T.R. 64; Knodel v British Columbia (Medical Services Commission) (1991) 58 BCLR (2d) 356 (S.C.), 371; Haig v Her Majesty the Queen in Right of Canada (1992) 16 C.H.R.R. D/226; Layland v Ontario Minister of Consumer and Commercial Relations (1993) 104 D.L.R. (4th) 214 (Ont.Div.Ct).

¹³⁸ M v H (1999) 2 S.C.R. 3 (S.C.C.).

The effect of the Act was to grant to same-sex couples living in relationships, the same rights as those enjoyed by different-sex common law (de facto) spouses in relation to 67 Ontario statutes.

Quite suddenly, there was a substantial change in Canada. M v H had raised doubts about the legality of refusing marriage licences to same-sex couple applicants and the reactions of officials – firstly in Ontario and, secondly, in British Columbia – were somewhat more guarded.

While the majority of the Court in M v H had emphasised that the case had “nothing to do with marriage per se”,¹³⁹ and did not “challenge traditional conceptions of marriage”,¹⁴⁰ the Court also stated that its decision “[might] well affect numerous other statutes that rely upon a similar definition of the term 'spouse' ”.¹⁴¹

On 8 June 1999, the Canadian House of Commons resolved that:¹⁴²

in the opinion of this House, it is necessary in light of public debate around recent court decisions, to state that marriage is and should remain the union of one man and one woman to the exclusion of all others, and that Parliament will take all necessary steps within the jurisdiction of the Parliament of Canada to preserve this definition of marriage in Canada.

The resolution had no formal effect, and it could be said that the Parliament of Canada did not take all the necessary steps to preserve the traditional definition of marriage. Above all, it did not invoke section 33 of the Charter.¹⁴³

¹³⁹ M v H (1999), 2 S.C.R. 3 (S.C.C.): Cory J, para.52.

¹⁴⁰ M v H (1999), 2 S.C.R. 3 (S.C.C.): Iacobucci J, para.134.

¹⁴¹ M v H (1999), 2 S.C.R. 3 (S.C.C.): Cory J, para.147.

¹⁴² Parliament of Canada, House Of Common Debates, 8 June 1999, Hansard, 1st Session, 36th Parliament, No.240, (http://www.parl.gc.ca/36/1/parlbus/chambus/house/debates/240_1999-06-08/han240-e.htm).

¹⁴³ The Canadian Charter of Rights and Freedoms s.33 reads:

- (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the

This meant that the common law, restrictive definition of “marriage” was still open to Charter-based scrutiny – a fact that left the door open for further challenge. And, it was not long before that challenge was taken up in three of the most populous provinces of Canada, and perhaps three of the most liberal.

Ontario (Part 1)

There were two separate series of events in the Province of Ontario, Canada, leading to the ultimate success of the demand before the courts for access to marriage by same-sex couples.

First, in 2000, when several same-sex couples approached the City of Toronto for marriage licences, city officials decided not to simply reject the marriage licence applications, but rather to put them in abeyance and seek direction from the Ontario Superior Court of Justice.¹⁴⁴ Six same-sex couples joined the City of Toronto in its application and the Court transferred the case to the Ontario Divisional Court.

Second, on 10 December 2000, Reverend Brent Hawkes of Toronto’s Metropolitan Community Church (MCC) stood in the church to publish the banns of marriage between Kevin Bourassa and Joe Varnell, and between Elaine and Anne Vautour.¹⁴⁵

Under a centuries-old tradition, the “reading the banns” took place in the Church for three successive weeks after which time the couples were issued with a marriage licence enabling the marriage ceremonies to take place in the Church.¹⁴⁶

declaration.

(4) Parliament or a legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

¹⁴⁴ Casswell, Donald G., “Moving Towards Same-Sex Marriage”, in [2001] 80 *La Revue du Barreau Canadien* 810: 811.

¹⁴⁵ “First Gay Banns Read in Toronto”, *PlanetOut News* (11 December 2000).

¹⁴⁶ Csillag, Ron, “A Man And A Woman, Period: Holy Matrimony Excludes Same-Sex Unions, Interfaith Coalition Says”, *TheStar.Com* (17 February 2000), http://thestar.com/apps/A.../Article_PrintFriendly&c=Article&cid=98225099230 (Retrieved: 18 February 2000).

The tradition of marrying by the reading of the banns is recognised in Ontario's provincial gender-neutral Marriage Act. When the banns are read, members of the congregation are invited to state any objections to the planned marriage. The grounds for objections, being that:

- (a) either party is below the legal age;
- (b) either party has been married before and has not obtained a divorce; or
- (c) that the two are too closely related to legally marry.

None of these grounds applied to the two couples in Toronto.¹⁴⁷

British Columbia (Part 1)

In 2000, when a couple in British Columbia applied for a marriage licence, the Director of Vital Statistics sought direction from the Attorney-General of the Province of British Columbia. The Attorney-General petitioned the Supreme Court of British Columbia for declaratory relief recognising the legal validity of same-sex marriages. This was remarkable – there had never previously been a provincial Government in Canada which had taken a stance in support of same-sex marriage.

The statement, issued on 26 May 2000, was as follows:¹⁴⁸

Earlier today, a same sex couple made application to the B.C. Executive Director of Vital Statistics for a marriage licence.

The Executive Director deferred his decision and asked for a legal opinion from the Ministry of Attorney General.

My Ministry will provide that opinion as soon as possible.

It is unfortunate that the law in this area is uncertain.

The federal Marriage Act is ambiguous but has traditionally been interpreted in light of common law principles that have not allowed same sex marriages.

¹⁴⁷ The discussion the Ontario same-sex marriage cases continues in Chapter 8.

¹⁴⁸ "B.C. Makes History: Supports Same-Sex Couples' Right To Marry", EGALE, Press Release, Canada (29 May 2000).

Recently, however, the Supreme Court of Canada has held that equality rights under section 15 of the Charter protect against discrimination on the basis of sexual orientation.

As yet, there has not been a definitive court determination on the application of section 15 with respect to the Marriage Act.

This area of the law requires clarity. This is a question of dignity and fundamental human rights for a number of Canadians, and an issue of fairness for all.

While it is possible to leave the issue of same sex marriages to be determined through years of litigation, it would be far better in my view for the federal government to resolve the matter by clarifying its legislation and offering same sex couples the same opportunity to marry as is available to heterosexual couples.

In a modern society there is no justification for denying same sex couples the same option to form marital bonds as are afforded to opposite sex couples.

Rather than waiting for the courts to determine this issue, the federal government should change the federal law to allow for equality for all couples who are in a committed relationship.

As a province, we have taken action to eliminate discrimination on the basis of sexual orientation within our areas of competence. We are continuing to remove legislative barriers that discriminate on the basis of sexual orientation.

Over the past 5 years we have amended more than 20 pieces of provincial legislation to eliminate this form of discrimination, and we will continue with our legislative initiatives in the near future.

We have taken these steps because it is the right and the fair thing to do.

On 29 July 2000, EGALE announced that the Government of British Columbia and EGALE were issuing separate legal proceedings against the federal Government challenging the restrictions on the right of same-sex couples to marry, the provincial Government claiming that “the restriction of marriage to heterosexuals violates the right to equality enshrined in the Charter of Rights”.¹⁴⁹

¹⁴⁹ “British Columbia Supreme Court to Hear Landmark Same-Sex Marriage Challenge”,

A newly formed British Columbia Liberal Government subsequently withdrew its legal action, but two more petitions to the Court were filed – one from five couples, and another from a further three couples.

In November of 2000, the B.C. Supreme Court made an order that all proceedings would be heard as one, and that evidence in any one proceeding, as initially filed, would be evidence in the others. The case was heard over several days between 23 July and 3 August 2001, and the decision of the Court was released on 3 October 2001.

In essence, the Court held that:

- 1) the restriction against permitting same-sex couples to marry was prima facie discriminatory and contrary to the Canadian Charter of Rights and Freedoms; but
- 2) it is legally acceptable on the basis that Section 1 of the Charter provides that, where the Government can show that such a breach of the Charter is demonstrably justifiable, the discriminatory law can stand.

The Court stated that it was “common sense” to restrict marriage to different-sex couples:^{150 151}

The legitimacy of the state’s interest in marriage is beyond question. There is no need for scientific evidence. The importance of the essential character of marriage to Canadian society is a matter of common sense understanding and observation.

United States Of America

Hawaii (Part 2)

As outlined previously, the Hawai’i Supreme Court returned the same-sex marriage case in that State to the trial court. In 1996, the State of

EGALE, Press Release, Canada (July 2001).

¹⁵⁰ EGALE Canada Inc et al v Attorney-General of Canada et al 2001 B.C.S.C. 1365: Pitfield J, para.209.

¹⁵¹ Note that the discussion on the Canadian same-sex marriage cases continues in Chapter 8.

Hawai'i attempted to prove, as per the admonition of the Supreme Court, that there were compelling State reasons to deny same-sex couples access to marriage.¹⁵² The State relied heavily on the arguments that same-sex marriage would undermine family and, particularly, that it would be detrimental for children to be brought up in same-sex families. However, the State failed in its bid and, in fact, the Court expressed the clear view that the State's expert witnesses assisted in demonstrating that there were no compelling State reasons why same-sex couples should not be permitted to marry. The Court rejected the tautological argument that tradition and the contemporary socially constructed meaning of marriage are sufficient justification for denying same-sex couples access to legal marriage.

As a result, on 3 December 1996, Circuit Court Judge Chang held that that the State had failed to convince the Court sufficiently to justify withholding from same-sex couples the right to marry, that Hawai'i's marriage laws therefore violated the State's Equal Rights Amendment and ordered the State to permit same-sex couples to marry. In particular, he held that the state had failed to present evidence to demonstrate:¹⁵³

- (a) that the public interest in the well-being of children and families, or the optimal development of children, would be adversely affected by same-sex marriage; and
- (b) how same-sex marriage would adversely affect:
 - the public purse;
 - the state interest in assuring the recognition of Hawai'i marriage in other states;
 - the institution of traditional marriage;
 - any other important public or governmental interest.

In essence, same-sex couples had successfully argued for the right to legally marry in the State of Hawai'i. But, unfortunately, this was not the conclusion of this case.

¹⁵² Baehr v Miike, No.91-1394, First Circuit Court, Hawaii (1996).

¹⁵³ Donald G. Casswell, "Moving Towards Same-Sex Marriage", in [2001] 80 La Revue du Barreau Canadien 810: 837.

For 24 hours same-sex marriage was legal in Hawaii. The next day, however, Judge Chang, on submission from the State of Hawai'i, put a stay on the order pending appeal.

Vermont (Part 1)

On 22 July 1997, three couples ¹⁵⁴ filed suit in the Chittenden Superior Court in Vermont, USA, seeking the right marry.¹⁵⁵ The suit alleged that the state's refusal to issue marriage licences to same-sex couples was a violation of the Vermont marriage statutes, and the Common Benefits Clause of the Vermont State Constitution.¹⁵⁶

The couples appealed to the Supreme Court of Vermont.¹⁵⁷ but their appeal was dismissed.

While the Court did not declare that same-sex couples should be permitted to marry under existing State marriage legislation, on the basis that the incidents of marriage to same-sex couples was "simply, when all is said and done, a recognition of our common humanity",¹⁵⁸ it did make

¹⁵⁴ Stan Baker and Peter Harrigan: had been together as a couple for four years and wanted to marry for the same mix of reasons that other couples choose to marry – they love each other and they wanted to make a public commitment to one another as well as seeking the legal protections and obligations of civil marriage; Lois Farnham and Holly Puterbaugh: had lived together as a couple for twenty-five years, but Farnham was not entitled to receive Puterbaugh's social security benefits, nor were they granted the right to make necessary medical decisions or act as each other's guardian in their old age; Nina Beck and Stacy Jolles: had been together for seven years. They declared their lifetime commitment to one another in a religious wedding ceremony, although that ceremony did not confer on them the protections and supports of a legal, civil marriage. Nina and Stacy had a son, Noah, who died in August 1997 of a heart condition. They believed that it was important not only that both his parents should have a legal connection to each other, but also that he deserved to have a legal connection to both his parents.

¹⁵⁵ Baker & Harrigan v State of Vermont, Chittenden Superior Court, Docket No. 1009-97-CnC (1997).

¹⁵⁶ The Common Benefits Clause (Chapter 1, Article 7) of the Vermont Constitution states "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation or community".

¹⁵⁷ Baker v Vermont Supreme Court of Vermont, Docket No. 98-032 (1999).

¹⁵⁸ Donald G. Casswell, "Moving Towards Same-Sex Marriage", in [2001] 80 La Revue du Barreau Canadien 810: 840.

the following statement:¹⁵⁹

Thus, viewed in the light of history, logic, and experience, we conclude that none of the interests asserted by the State provides a reasonable and just basis for the continued exclusion of same-sex couples from the benefits incident to a civil marriage license under Vermont law. Accordingly, in the faith that a case beyond the imagining of the framers of our Constitution may, nevertheless, be safely anchored in the values that infused it, we find a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that Vermont law provides opposite-sex married couples. It remains only to determine the appropriate means and scope of relief compelled by this constitutional mandate.

And the Court held that:^{160 161}

The judgment of the superior court upholding the constitutionality of the Vermont marriage statutes under Chapter I, Article 7 of the Vermont Constitution is reversed. The effect of the Court's decision is suspended, and jurisdiction is retained in this Court, to permit the Legislature to consider and enact legislation consistent with the constitutional mandate described herein.

Alaska

On 27 February 1998, the court in Brause v Bureau of Vital Statistics¹⁶² ruled that same-sex couples have a fundamental right to marriage. The court ruled that Alaska's marriage laws violated the right to privacy, the fundamental right to marry, and constituted sex discrimination.

Somewhat hidden in the latter stages of the progression of Baehr, what was effectively a streamlined version of the Hawai'i case entered the Alaskan courts.¹⁶³

¹⁵⁹ Baker v Vermont Supreme Court of Vermont, Docket No. 98-032 (1999): (no paragraph or page numbers).

¹⁶⁰ Baker v Vermont Supreme Court of Vermont, Docket No. 98-032 (1999): (no paragraph or page numbers).

¹⁶¹ See discussion in Chapter 8 on subsequent actions by the Vermont legislature in providing for civil union legislation.

¹⁶² Brause v Bureau of Vital Statistics No.3 AN-95-6562, 1998 WL 88743 (Alaska Superior Ct., 27 February 1998).

¹⁶³ Brause v Bureau of Vital Statistics No.3 AN-95-6562, 1998 WL 88743 (Alaska Superior Ct. 27 February 1998).

The Alaska Marriage Code expressly defines marriage as “a civil contract entered into by one man and one woman that requires both a licence and a solemnization”.¹⁶⁴

In Brause, the Court held that the denial of marriage to same-sex couples was in violation of the equal protection provisions of the Alaskan State Constitution, and directed the State to establish a “compelling State reason” why same-sex couples should not be permitted to marry.

Later in 1998, however, in a public referendum, an amendment to the Constitution was approved by voters and, as a consequence, marriage was expressly limited to a man and a woman, effectively overruling the previous Court’s decision.¹⁶⁵

Once again, a technical victory had been achieved, but popular prejudice became the tool for achieving a Constitutional reversal of that victory.

Hawaii (Part 3)

Finally, in November 1998, the people of the State of Hawai’i voted for a constitutional amendment that permitted (although did not require) the legislature to restrict marriage to opposite-sex couples. As a result of the voter referendum, Article 1, Section 23 of the Hawai’i Constitution read:

The legislature shall have the power to reserve marriage to opposite-sex couples.

The legislature further proposed an amendment to the marriage legislation, alongside legislation providing a range of rights and benefits through a Reciprocal Beneficiaries Act.

On 9 December 1999, the Hawai’i Supreme Court ruled that judgment now be entered in favour of the State, and that the prior judgment in favour of the Plaintiffs be rendered moot.¹⁶⁶

¹⁶⁴ Alaska Marriage Code A.S.25.05.011(a).

¹⁶⁵ Alaska Constitution, Article I, § 23 (1998).

¹⁶⁶ Baehr v Miike 1999 Haw. LEXIS 391 (1999)

In effect, this was the first successful same-sex marriage case although, in the final analysis, the positive result achieved through the courts was negated constitutional amendment.

This sequence of Hawai'i cases was significant for several different reasons:

- This constituted the initiation of a renewed effort by same-sex couples to seek access to marriage – an effort that was, ultimately, to prove successful, although not in Hawai'i.
- This was the first case in which a court had held that exclusion of same-sex couples from marriage was discriminatory.
- This was to be the catalyst for the federal Defense of Marriage Act and, directly or indirectly, for the passing of defense of marriage legislation or constitutional amendments in a number of other States in the United States of America.
- It also provides persuasive contrary argument for a number of 'public policy' reasons propounded for denying same-sex couples access to marriage – for example, the procreation argument, the argument that it is detrimental for children to be raised in same-sex families.

The State found a means of using the State Constitution to protect majoritarian public prejudice rather than using it to protect minority rights with the effect that what was a huge legal victory for same-sex couples in Hawai'i had become a technical victory only.

Vermont (Part 2)

Although, in July 1997, three same-sex couples had been unsuccessful in their bid for marriage, Vermont was still destined to become the first state within the USA to offer "full" civil unions (registered partnerships). Vermont's Civil Unions legislation came into effect on 1 July 2000. This legislation arose out of a directive of the Vermont Supreme Court which had held that the State of Vermont was in breach of the Common

Benefits Clause of the Vermont Constitution ¹⁶⁷ by not offering the same rights and freedoms to same-sex couples as it offers to opposite-sex couples. The Court, however, stopped short of striking down the existing marriage legislation as being unconstitutional and instead directed that the State must act to grant rights equivalent to those of marriage.

The absence of the word “marriage” is significant – the unions aren’t recognised outside the state of Vermont. Federal marriage rights (such as social security survivor’s benefits) do not apply.

Even so, Vermont’s civil union legislation is reasonably comprehensive in that, in addition to the usual provisions relating to matters such as eligibility to register and procedures for dissolution, it provides a range of legal benefits, protections and responsibilities including (but not limited to):

- relationship property rights during life or upon death;
- causes of action relating to spousal status, such as wrongful death, emotional distress; spousal immunities
- adoption of children;
- financial matters, such as insurances, benefits, taxation;
- next-of-kinship in relation to hospital visitation, medical decision-making, anatomical gifts; and
- prohibitions against discrimination on ground of spousal status.

The Defense of Marriage Act (Federal USA)

The Defense of Marriage Act (DOMA), effective at federal level in the United States of America, was passed by the Senate on 11 September 1996 with a vote of 85 to 14 and signed into effect by President Bill Clinton on 21 September 1996.¹⁶⁸

¹⁶⁷ The Vermont Constitution Ch.1, Art.7 provides: That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

¹⁶⁸ Defense of Marriage Act (DOMA). Pub. L. 104-199, 100 Stat. 2419 (21 September

This statute has two major effects:

- (1) It means that all States within the US have a free choice as to whether or not they are going to recognise any marriage from another State.
- (2) It prohibits social security and other federal benefits for spouses in same-sex marriages.

The key catalyst for the DOMA was the possibility of success in the Hawai'i same-sex marriage case, Baehr v Lewin,¹⁶⁹ and the perceived need to 'protect' other States from having to, potentially, recognised same-sex marriages that could become valid in Hawai'i. Thus, this was a pre-emptive move which meant that if same-sex marriage became legal in any State, no other State would be obliged to recognise those marriages. The DOMA did not prevent any State from passing legislation to clarify that it would recognise same-sex marriage from other States.

In reality, the federal Defense of Marriage Act has little impact on whether individual States may or may not recognise same-sex marriages. Rather, the real effect of the Act is to disallow those benefits under federal law to which married couples would normally have access.¹⁷⁰

The constitutionality of the DOMA has never been tested. It has been argued that, following Romer v Evans reasoning,¹⁷¹ the DOMA might be struck down. In Romer the Court struck down Amendment 2 of the Colorado Constitution which prohibited enactment of legislation specifically protecting homosexuals on the basis that this violated the Equal Protection Clause. Under the reasoning in Bowers v Hardwick,¹⁷² however, it seems unlikely that a court would strike down the DOMA legislation as, in that case, the Court did not deem homosexuality to be a fundamental right, and therefore would not be likely to view same-sex

1996).

¹⁶⁹ Baehr v Lewin First Circuit Court, Hawaii (1991) [Full citation not known]; Baehr v Lewin 74 Haw. 530, 852 P.2d 44 (1993); Baehr v Miike No.91-1394, First Circuit Court, Hawaii (1996); and Baehr v Miike 1999 Haw. LEXIS 391, (1999): See discussion on the Hawai'i case(s) in Chapter 6 and earlier in this chapter.

¹⁷⁰ Feather, Nancy J., "Defense of Marriage Acts: An Analysis Under State Constitutional Law", in [1997] 70 Temple Law Review 1017: 1032.

¹⁷¹ Romer v Evans 116 S.Ct. 1620 (1996).

¹⁷² Bowers v Hardwick 478 US 186 (1986).

marriage as a fundamental right. It is probably for this reason that a constitutional challenge has not been made against the federal Defense of Marriage Act.

Have other countries done anything like this?

This seems to be a more prevalent occurrence in the United States than elsewhere in the world, although some other countries have similar laws.

The Marriage Act 1961 of the Commonwealth of Australia was not clearly gender-specific. In 2004, the Commonwealth Parliament passed its Marriage Legislation Amendment Act 2004 which inserted a definition into s5(1) of the Marriage Act 1961 that provides:

Marriage, means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

California (Part 1)

In 2000, as a result of the Proposition 22 process, California State passed its own California Defense of Marriage Act. There were two elements to the Proposition 22 amendment process. The first part related to the definition of marriage within California, and the second to the recognition within California of marriages from outside the State.

Prior to amendment, the California Civil Code 4100 defined marriage, in a gender-neutral manner, as:¹⁷³

"a personal relation arising out of a civil contract, to which consent of the parties making that contract is necessary."

While related sections in the Code made use of gender-specific terms, it was unclear whether or not the legislation would allow or prohibit access to marriage by same-sex couples. On this point, as a result of the Proposition 22 process, the California Family Code s.300, which now

¹⁷³ California Civil Code s.4100 (predecessor to what is now codified at California Family Code s.300).

replaced the was changed to read:

*a personal relation arising out of a civil contract **between a man and a woman**, to which the consent of the parties capable of making that contract is necessary. [Emphasis added]*

The second issue that arose was that opponents of same-sex marriage had realised that, even though the definition governing who may marry would now explicitly preclude contracting a same-sex marriage in California, a separate provision might still require California to recognise out-of-state same-sex marriages:¹⁷⁴

A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.

This provision was also amended by the insertion of the words:

Only marriage between a man and a woman is valid or recognized in California

The citizens of California were asked to vote on whether or not marriage should be reserved for opposite-sex couples. A particularly bitter battle ensued, fuelled by the tensions between, on the one hand, the high gay and lesbian populations in some areas within California and, on the other hand, strong Mormon and Catholic and fundamentalist Christian organisations which invested many millions of dollars in the campaign.

Even though some considered that, under California state law marriage could only be between a man and a woman,¹⁷⁵ and that ‘Proposition 22’ was therefore unnecessary, the initiative was passed.

In effect, therefore, the referendum was broader than the legal-technical provisions of the legislation. It was more about a public debate on Californian’s views on the desirability of same-sex marriage,¹⁷⁶ and a public display of strength of the conservative groups, both within California and from outside, and their opposition to the “gay agenda”.¹⁷⁷

¹⁷⁴ California Family Code s.300 and s.308.

¹⁷⁵ Wald, Michael S., et al, “An Analysis Of Proposition 22: The Knight Initiative”, (The Stanford Institute for Research on Women and Gender / The Stanford Center on Adolescence (December 1999).

¹⁷⁶ Wald, Michael S., et al, “An Analysis Of Proposition 22: The Knight Initiative”, The Stanford Institute for Research on Women and Gender / The Stanford Center on Adolescence (December 1999).

¹⁷⁷ It is interesting to note that: (a) only 34% of eligible Californian population voted (6.8

South Africa

In 1994, Nelson Mandela was elected President of the Republic of South Africa. He was to remain President from May 1994 until June 1999.

During his term as President, a new Constitution of the Republic of South Africa was drafted. The Constitution was approved by the Constitutional Court on 4 December 1996, and took effect on 4 February 1997.¹⁷⁸

The constitutional shift in South Africa in a very short period of time had been remarkable, and this was to be reflected in the Constitution that was to make South Africa the first country in the world to expressly, constitutionally prohibit discrimination on the ground of sexual orientation. The Constitution also included an express reference to the “inherent dignity” of the person.¹⁷⁹

9. Equality

- (1) *Everyone is equal before the law and has the right to equal protection and benefit of the law.*
- (2) *Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.*
- (3) *The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin,*

million voters); (b) 61% of those who voted, voted “Yes” to Proposition 22 (4.2 million voters, or 21% of eligible Californian population); (c) 29% of those who voted, voted “No” to Proposition 22 (2.6 million voters, or 13% of eligible Californian population); (d) 66% of eligible Californian population did not vote (13.2 million voters). That means that a ‘majority’ vote on a minority rights issue was carried with a vote of 21% of eligible population: “California Proposition 22: The Limit on Marriage Initiative Archive”; <http://www.prop22.org/> (Retrieved: 28 June 2000).

¹⁷⁸ South African Government Information; <http://www.info.gov.za/documents/constitution/index.htm> (Retrieved: 14 August 2009).

¹⁷⁹ Constitution of South Africa Art.9 and Art.10.

colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

10. Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.

This was to have significant implications for the issue of same-sex marriage in South Africa, as will be discussed in Chapter 8.

The Netherlands

The Netherlands has historically been a strongly religious nation and until 1994 had had a strong religious presence in its Parliament. However, following the decline of the religious political parties, 1994 saw the first wholly secular coalition Government. However, on 17 December 1997, this Government passed the legislation enabling registered partnerships ('geregistreerd partnerschap') for both same-sex and different-sex couples. The legislation came into effect on 1 January 1998.¹⁸⁰

Dutch registered partnerships provide almost all of the entitlements of marriage. There were initially some restrictions around residence requirements and the ability to adopt, but these have largely now been made equivalent to those associated with marriage. In recognition of the strictly secular nature of the registered partnerships, the legislation provides that they may not be blessed in a Church, although the legislation does now provide that a registered partnership may be converted into a marriage.¹⁸¹

¹⁸⁰ "Dutch Law Allows Same-Sex Marriages", Associated Press (31 March 2001); see also:

http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (Retrieved: 13 August 2009).

¹⁸¹ <http://hollandsouth.angloinfo.com/countries/holland/gaymarriage.asp> (Retrieved: 22 July 2009).

COMMENT ¹⁸²

In this period (1994 through 2000), there was a great deal of progress across a number of jurisdictions in the area of the legal recognition of same-sex relationships. This was especially so with registered partnerships with Greenland, Sweden, Iceland, The Netherlands, Belgium, and France all following the lead of Denmark and passing legislation to allow for partnership registration.

In Canada, the Supreme Court confirmed sexual orientation as an analogous ground of prohibited discrimination under the Charter of Rights and Freedoms. With the Charter being supreme legislation this provided a more realistic possibility of the unequal treatment of same-sex couples as compared with different-sex couples being found to be in breach of the Charter protections. In 1999, the Supreme Court of Canada held that the exclusion of same-sex couples from being able to access the entitlements available to different-sex couples was discriminatory. Although the original point of reference for this case was the laws of the Province of Ontario, this case was to have implications for family law across all Canadian provinces. And, in 2000, both Ontario and British Columbia entered into the same-sex marriage debate with court cases being filed in both provinces. The inclusion of “sexual orientation” in the Charter had made an immediate and substantive difference to the same-sex couples of Canada and their fight to equal rights.

In 1994, South Africa stepped out of the apartheid regime. In that year, Nelson Mandela became President of the republic of South Africa. By early 1997, South Africa was to have a new Constitution which, as a first for any country in the world, included sexual orientation as an expressly protected ground of discrimination. As will be discussed in the next chapter, this was to set the scene for further developments with regard to access to marriage for same-sex couples within the next few years.

¹⁸² The information contained in this section constitutes my comment based on information presented previously in this chapter. For that reason I have not directly referenced the source material for this section.

In the United States of America, between 1996 and 1999, the States of Hawai'i and Alaska both got marriage and then lost it again. The success came in the courts – the reversal came by way of populist referenda resulting in Constitutional amendment. These cases prompted the Federal Defense of Marriage Act (DOMA) and amendments across a number of States to ban the solemnisation of same-sex marriages within their States, or the recognition in some States of same-sex marriages from any other State. This, in spite of the fact that no State actually had same-sex marriage yet. In 1997, civil unions came to Vermont, enacted by the legislature, but subsequent to a same-sex marriage case that had failed before the courts.

The period from 1994 to 2000 provided mixed results in New Zealand. The Quilter same-sex marriage case went before the High Court (April 1996) and, on appeal, to the Court of Appeal (in September 1997). The action failed in that it was not successful in securing equal access to marriage for same-sex couples in New Zealand, and was a disappointment with regard to some of the Judicial reasoning. On the other hand, there were some highlights. For a period of time, the same-sex marriage issue was widely debated across New Zealand – giving the issue profile. The judgment of Justice Thomas, however, remains as one of the key highlights of the case. Although he was in a minority of one in holding unequivocally that exclusion of same-sex couples from marriage was (is) discriminatory, the integrity of his judgment still holds today – alongside the judgments of Justices in overseas jurisdictions whose judgments have been instrumental in bringing same-sex marriage to those countries.

The action or reaction of the Government and Parliament in New Zealand during this time was more concerning. On several occasions, it seemed that the Government was consciously seeking to impart the message that it was not interested in human rights or equality. First, the Government proposed legislation to cancel Consistency 2000 Project – the work programme mandated by the Human Rights Act 1993 whereby Government must assess all legislation for compliance with New Zealand's human rights standards. Second, the Government made it

clear that it did would not include de facto couples within the same relationship property legislation as married couples, but rather it would create separate 'de facto property' legislation; and, it made it clear that same-sex couples would not be included in property legislation at all. Third, the Government, in the wake of the failed Quilter case, and the debate about the protection of same-sex couples' relationship property rights and, in the face of human rights legislation protecting the rights of minorities, issued a Discussion Paper seeking public (majoritarian) comment on how same-sex couples should be treated by the law. As if to rub salt into the wounds, the Government also declared that same-sex marriage was not 'on the table' for debate. These actions all seem to be symbolic of a Government that really did not want to face the issues of the rights of same-sex couples.

In contrast with progress made overseas, there were no significant advances made in New Zealand during this time. Where New Zealand had previously been seen to be in a favourable position with regard to the recognition of the rights of same-sex couples, now we were getting the sense that we were watching other countries coming from behind and moving slightly ahead of us.

Chapter 8

2001 – 2006

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NEW ZEALAND

Introduction

The latter part of the 1990s had been a period of great disappointment for those interested in the rights of minority groups in New Zealand. Those of us engaged in seeking access to marriage for same-sex couples felt it keenly, as the right to equal treatment before and under the law, that we thought had been fought for in relation to the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, failed to materialise. The Quilter case, for example, was cited by some as a demonstration of the weakness, the “lack of teeth” of our Bill of Rights.¹

Social and human rights issues gave way to fiscal constraints and free-market economics in the public sector. We were told that all would be cured by way of the “trickle-down”. It is true that a healthy community will be less reliant on active supports and protections through welfarism or rights-based agencies. But, the danger was, that while New Zealand was waiting for community health to thrive, much of the social stability of our communities could be undermined.

As it happened, by the time the Labour-led coalition came into office after the November 1999 General Election, New Zealand was at least (statutorily) two years behind in our human rights compliance programme, and, because of the cancellation of the “Consistency 2000” Project and the subsequent wrangling over the amendment Bills, in a practical sense, the real time lost was considerably more.

However, there was some reason for optimism. There were a number of reasons to expect, or at least hope, that the new Government would initiate a catch-up period. Furthermore, it was expected that this catch-up would be rather swift.

¹ Comment by Jenny Rowan and Jools Joslin following the decision, on 17 December 1997, of the Court of Appeal in Quilter v Attorney-General [1998] 1 NZLR 523.

First, much was made of the fact that amongst the new Labour Government were Chris Carter (New Zealand's first "out" gay MP, and New Zealand's first "out" gay Cabinet Minister), Tim Barnett (the first New Zealand MP to be elected as an "out" gay man), and Georgina Beyer (the world's first known transsexual MP). This does speak volumes for the acceptance of diversity within the party, which had also been conveyed by the Party's support for gay and lesbian rights issues through a number of other MPs, including the Prime Minister.

Second, Labour MPs had been very outspoken with regard to the previous Government's attempts to stifle Government's compliance with human rights laws in New Zealand.²

We will be the Government in just a few months – one that will be proud to be judged on its human rights record.

We were placed in this position by the unilateral decision of the Government, not endorsed by Parliament ... At least I can have confidence that the change of Government later this year will bring about a far greater commitment to human rights than we have seen today.

In fact, Tim Barnett had put great effort into ensuring that the attempt to provide for a permanent exemption for Government from human rights compliance did not happen, and was largely instrumental in ensuring the introduction and passing of the Human Rights Amendment Bill (No.2) which successfully preserved the consistency programme, albeit in a new form.³

It could be said that the first-term Labour Government of the three years from 1999 to 2002 was the most gay-friendly, and perhaps the most gay-progressive, that we have had. On the other hand, there was no room for

² (1) Hansard, "Human Rights Amendment Bill (No.2)", Second Reading, (3 July 1999): Tim Barnett, New Zealand Labour, Christchurch Central; (2) Hansard, "Human Rights Amendment Bill (No.2)", Second Reading (13 July 1999): Lianne Dalziel, New Zealand Labour.

³ Upon passing, the Human Rights Amendment Bill (No.2) 1998 became the Human Rights Amendment Act 1999.

complacency. For example, the compliance programme, which should have been completed by 31 December 2001, remained incomplete.⁴ The new Government initiated its programme of policy and legislative review, including its proposal to legislate for civil unions, a move that those of us seeking the right to marriage did not see as satisfying the equality principles.

New Zealand Goes To The United Nations Human Rights Committee

Introduction

Following the decision of the New Zealand Court of Appeal not to make a declaration that same-sex couples are permitted to marry under the Marriage Act 1955, two lesbian couples who decided to take the case to the United Nations Human Rights Committee (UNHRC).⁵ The Communication (complaint) was made in reliance upon the procedural provisions of the First Optional Protocol to the International Convention on Civil and Political Rights. These provisions enable citizens of a State Party to forward a Communication to the UNHRC. Article 1 of the Convention provides:⁶

A State Party to the Covenant that becomes a Party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be

⁴ This was subsequently remedied to a larger extent by the omnibus Relationships (Statutory References) Act 2005 and other specific legislation which resulted in legislative amendments to many statutes in order to provide equally for married (different-sex) couples, for different-sex and same-sex couples in civil unions or de facto relationships, full compliance of all legislation in New Zealand with domestic human rights standards has not yet been realised. Aside from the Marriage Act 1995, a prime example of this non-compliance is the Adoption Act 1955. For more detail on this, see discussion in Chapter 6.

⁵ Jools Joslin and Jenny Rowan, and Marg and Lindsay Quilter were two of the couples who had been parties to the Quilter same-sex marriage cases: Quilter v Attorney-General [1997] 14 FRNZ 430 (High Court); [1998] 1 NZLR 523 (Court of Appeal).

⁶ New Zealand had ratified and acceded to the Optional Protocol to the ICCPR on 26 May 1989.

victims of a violation by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a Party to the present Protocol.

The substantive complaint was made in reliance on a number of provisions in the Convention itself.⁷

The Communication

The issue

The Joslin Communication,⁸ first and foremost, was about the right to equal treatment before the law.

The authors presented the marriage issue (the right to marry – Article 23.2 of the ICCPR) in the context of the right to equal treatment before the law (Article 26 of the ICCPR) and the requirement of the State to ensure the provision of all rights in the Covenant without distinction on prescribed grounds (Article 2 of the ICCPR). The authors did not present the marriage issue in isolation.

In other words, the authors argued that New Zealand (as a State Party to the Covenant) must not act in a discriminatory manner by denying same-sex couples access to marriage, rather than arguing specifically that same-sex couples must have the right to marry under New Zealand law.

Article 26 is a fundamental provision of the Covenant in that it:

- advocates equality before the law and equal protection of the law;
- prohibits any distinction the effect of which is to prevent all persons from being treated on an equal footing;
- requires that legislation enacted by a State party not be discriminatory;

⁷ In addition to the information presented in the following section, a commentary on each of the provisions of international human rights law relied on by New Zealand is contained in Chapter 4.

⁸ Joslin v New Zealand Communication No. 902/1999.

- is autonomous (that is, a stand-alone right); and
- covers direct and indirect discrimination.

Not only is discrimination clearly prohibited by Article 26, but also the UNHRC itself has stated that:⁹

Non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitutes a basic and general principle relating to the protection of human rights.

Freedom from discrimination is therefore an overarching freedom which, in my view, impacts upon other provisions within this (the ICCPR) and other Covenants, and dictates how those other provisions must be interpreted.

Discrimination

The only situation in which it may be acceptable to treat persons differently on the basis of a particular personal characteristic (such as "sex" or "sexual orientation") is where that different treatment is reasonable and objective, and is aimed at achieving a legitimate purpose under the Covenant. In circumstances where these criteria are not met, different treatment will amount to discrimination.

Thus a consideration of whether or not a particular provision, in this case marriage, is discriminatory would flow as follows:

- Does the exclusion from marriage result in different treatment for same-sex couples (based on, for example, their "sex" or "sexual orientation")?;
- Does this different treatment result in a detriment to same-sex couples?;
- Is there a reasonable, objective and legitimate purpose for this different treatment?

⁹ United Nations, General Comment No.18 (9 November 1989).

*The Views of the Committee*¹⁰

The main part of the Views of the UNHRC reads as follows:¹¹

8.1 - *The Human Rights Committee has considered the present communication in the light of all the information made available to it by the parties, as provided in article 5, paragraph 1 of the Optional Protocol.*

8.2 - *The author's essential claim is that the Covenant obligates States parties to confer upon homosexual couples the capacity to marry and that by denying the authors this capacity the State party violates their rights under articles 16, 17, 23, paragraphs 1 and 2, and 26 of the Covenant. The Committee notes that article 23, paragraph 2, of the Covenant expressly addresses the issue of the right to marry. Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defined a right by using the term "men and women", rather than "every human being", "everyone" and "all persons". Use of the term "men and women", rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of the States parties stemming from article 23, paragraph 2, of the Covenant is to recognize as marriage only the union between a man and a woman wishing to marry each other.*

8.3 - *In light of the scope of the right to marry under article 23, paragraph 2, of the Covenant, the Committee cannot find that by mere refusal to provide for marriage between homosexual couples, the State party has violated the rights of the authors under articles 16, 17, 23, paragraphs 1 and 2, or 26 of the Covenant.*

9. *The Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol, is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.*

¹⁰ The "Views" of the Human Rights Committee in response to any Communication (complaint) to it are, essentially, its decision. However, unlike the results of court decisions under domestic law, the Views of the Committee are not binding on the State party and constitute recommendations only.

¹¹ The "Views of the Human Rights Committee" in relation to *Joslin v New Zealand* Communication No 902/1999, New Zealand (30 July 2002), <http://www.unhcr.ch/tbs/doc.nsf/MasterFrameView/e44ccf85efc1669ac1256c37002b96c9?Opendocument> (Retrieved: 3 September 2002). The joint individual opinion of Committee Members (Mr Rajsoomer Lallah and Mr Martin Scheinin) is well worth reading.

Comment on the Decision

When I read the Views of the Committee, I was extremely disappointed. The Committee's substantive response seemed somewhat brief and, in my analysis did not seem to address, in a proper and logical manner, the key issues placed before the Committee. In fact, in many ways, the Committee approached the Joslin Communication in very much the same way that the majority of the Court of Appeal in New Zealand had approached Quilter.¹²

... the Committee delivered its views, rejecting the complaint on the basis that the ICCPR affirmation in article 23 of the right to marry envisaged different-sex marriage only. The plaintiffs therefore lost for the same reasons as they had in the New Zealand courts; the ICCPR (like New Zealand's Marriage Act) affirmed a heterosexual conception of marriage. On that basis the true merits of the question were not reached in Joslin".

The similarities between the New Zealand Court of Appeal in Quilter and the United Nations Human Rights Committee in Joslin can be summarised as follows:

TABLE 7: SIMILARITIES BETWEEN <u>QUILTER</u> AND <u>JOSLIN</u>	
Court In <u>Quilter</u>	Committee In <u>Joslin</u>
Court does not directly address the issue whether or not denial of access to marriage is discriminatory.	Committee does not directly address the issue whether or not denial of access to marriage is discriminatory.
Court focuses on the definition / meaning of the word 'marriage' (as intended by the Parliament of New Zealand in 1955).	Committee focuses on definition / meaning of the word 'marriage' (as interpreted by them in relation to the Convention).
The Court defers to the sovereignty of Parliament	The Committee defers to the sovereign State
The Court accepts tradition, and therefore the traditional meaning of marriage, as dominant.	The Committee accepts tradition, and therefore the traditional meaning of marriage, as dominant.

¹² Rishworth, Paul, "Changing Times, Changing Minds, Changing Laws – Sexual Orientation And New Zealand Law, 1960 to 2005", in [2007] 11 The International Journal of Human Rights 85: 97.

On the other hand, there are some obvious differences. The differences between Quilter and Joslin can be summarised as follows:

TABLE 8: DIFFERENCES BETWEEN <u>QUILTER</u> AND <u>JOSLIN</u>	
Court In <u>Quilter</u>	Committee In <u>Joslin</u>
Issue considered in the context of domestic human rights laws	Issue considered in the context of international human rights laws
The issue relates to and the outcome applies to the domestic jurisdiction only	The Committee had to be mindful of international forum and the implications of its Views for jurisdictions across the international community
Domestic considerations only	Regional considerations and the margin of appreciation
Sets binding precedent on inferior courts	View of the Committee are not binding
Deference to Parliament	Deference to sovereign State
Court interprets the contested legislation, almost without looking at the human rights that were invoked.	Committee looks at the human rights invoked, almost without looking at the contested legislation.
Court looks at the meaning of 'marriage' – that is, the right to <u>marry</u> .	Committee looks at the meaning of 'men and women' in the formulation of the right to marry - that is, the <u>right</u> to marry.

In Broeks v Netherlands,¹³ the United Nations Human Rights Committee responded directly to the claim of discrimination. Broeks had been employed as a nurse but, after becoming ill, had received support

¹³ Broeks v Netherlands, Communication No 172/1984, The Netherlands (9 April 1987).

through Netherlands social security. After a period of time, in accordance with the relevant laws, her benefits were stopped. She complained to the United Nations Human Rights Committee that:

- had she been a man (married or unmarried) she would have been able to continue on the benefit; and
- the Unemployment Benefits Act violated her right under Article 26 of the International Covenant on Civil and Political Rights, to equality before the law and equal protection of the law.

The State argued that the entitlement to social security arose under the International Covenant on Economic, Social and Cultural Rights and therefore the provisions of the International Covenant on Civil and Political Rights did not apply:¹⁴

The Netherlands Government takes the view that article 26 of the Covenant does entail an obligation to avoid discrimination, but that this article can only be invoked under the Optional Protocol to the Covenant in the sphere of civil and political rights ...

In response, the Committee expressed its view that the issue did come under the Article 26 protections:¹⁵

Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

The Committee went on to decide that, because she was a woman, Mrs Broeks had suffered different and disadvantageous treatment in comparison with the treatment she would have received had she been a man. The different treatment to which Broeks had been exposed, therefore, constituted discrimination on the ground of gender.

¹⁴ The "Views of the Human Rights Committee" in relation to: Broeks v Netherlands, Communication No 172/1984, The Netherlands (9 April 1987): para.8.3.

¹⁵ The "Views of the Human Rights Committee" in relation to: Broeks v Netherlands, Communication No 172/1984, The Netherlands (9 April 1987): para.12.4.

In Joslin, the Committee avoided a full consideration of whether or not denial of access to marriage was discriminatory by relying on the view that the term “marriage” in international conventions is, by definition, heterosexual marriage.

The Committee did not address the issue of discrimination. It did not consider the impact of Articles 26 and 2.1 on Article 23.2. Instead of considering the primary and fundamental issue of the right of persons to be free from discrimination, the Committee presented a response on the secondary, narrower and singular issue of the right to marry. Further, it allowed its response to be led by a definition of marriage based in tradition, employing that narrow meaning to justify a narrow meaning for the term marriage in the Covenant. And, if marriage is, by definition, the union of a man and a woman, the exclusion of same-sex couples from marriage cannot, because of that definition, be discriminatory.

It was this reasoning that enabled the Committee to state:¹⁶

The Human Rights Committee ... is of the view that the facts before it do not disclose a violation of any provision of the International Covenant on Civil and Political Rights.

In this, the Committee used the same circular argument that has been used by the courts in several domestic jurisdictions, including New Zealand, in the past. The argument fails.

If the Committee had applied the same reasoning that it had applied in Broeks, the reasoning would have been along the lines:

- The State is arguably under no obligation to provide a legal regime for the formal recognition of relationships.
- However, if the State does enact legislation for this purpose, then “such legislation must comply with article 26 of the International Covenant on Civil and Political Rights”.¹⁷

¹⁶ The “Views of the Human Rights Committee” in relation to: Joslin v New Zealand, Communication No 902/1999, New Zealand (30 July 2002): para.9.

¹⁷ The “Views of the Human Rights Committee” in relation to: Broeks v Netherlands, Communication No 172/1984, The Netherlands (9 April 1987): para.12.4.

- New Zealand has enacted legislation for the recognition of relationships (the Marriage Act 1955) and therefore, the Marriage Act 1955 “must comply with article 26 of the International Covenant on Civil and Political Rights”.¹⁸
- In New Zealand some couples, on the basis of their sex (gender) and sexual orientation, are excluded from marriage and suffer disadvantage because of that exclusion.
- The exclusion of those couples from marriage, therefore, constitutes discrimination.

As suggested by Rishworth,¹⁹ nothing in this decision stops any country from extending marriage to same-sex couples. Correctly also, the View leaves this decision, in this case, to the State party. However, a full consideration of the issue of discrimination could have been forthcoming from the Committee. By adopting and perpetuating this singular meaning the Committee has side-stepped the fundamental issue of discrimination.

Summary

I do not believe it is possible to consider Article 23.2 in isolation, as the Committee has done. Article 23.2 must be considered in the context of whether or not it complies with Article 26 and Article 2.1. The consideration of the Committee in Broeks supports this view.

The reasoning by the UNHRC merely raises again the same question that was raised by Quilter in the New Zealand courts, and by other cases in overseas jurisdictions where the same “solution” has been promulgated. Namely, can past discrimination (by definition, less favourable treatment that is not justifiable) be used to justify current discrimination? I would suggest that it is difficult to find a situation where current practice can be justified solely on the basis of past practice. Conversely, there are many instances where the development of new practices can be justified on the basis that the old, traditional practices are no longer acceptable.²⁰

¹⁸ The “Views of the Human Rights Committee” in relation to: Broeks v Netherlands, Communication No 172/1984, The Netherlands (9 April 1987): para.12.4.

¹⁹ Rishworth, Paul, “Human Rights”, in [2003] NZLRev. 261: 267.

²⁰ See earlier discussion on ‘Tradition’ in Chapter 3.

In both Quilter and Joslin, the decision-makers have failed to ask, first of all, whether the denial of access to marriage constitutes discrimination against same-sex couples. It is the issue of discrimination that must be considered the primary issue, and not what constitutes the traditional (that is, 1950s) definition of marriage.

Post Script

After receiving the final Views of the UNHRC in response to the Joslin Communication, the Authors prepared a submission seeking a reconsideration of the issue by the Committee. The basis of this request was that the Committee had failed to take into consideration the results of a recent case before the European Court of Human Rights. In essence, the case (Goodwin v United Kingdom) held that "the right of men and women to marry" can no longer be confined to persons of "opposite biological sex".

We ultimately received a negative response, however, stating:

The Committee, acting through its Special Rapporteur on New Communications, has taken note of your submissions, and considers that, on the arguments presented, it would not be an appropriate use of any exceptional power to reconsider its adopted Views in this instance.

So ... the original "Final Views" of the Committee still stand.

Meanwhile ... Back in the Legislature

Re-Evaluation of the Human Rights Protections

The policies of both partners to the new coalition Government (Labour and Alliance) made a clear commitment to a review of human rights legislation and the structures which implement it. In April 2000 the Government commissioned a Team of four experts in human rights to conduct an independent ministerial re-evaluation of human rights protections in New Zealand.

The tasks for the ministerial re-evaluation Team were (in summary):²¹

1. to re-evaluate, and if necessary recommend changes to, the nature and scope of the provisions of the Human Rights Act 1993;
2. to develop recommendations for the relationship of our domestic human rights laws to other legislation, including a consideration of the primacy or otherwise of human rights laws;
3. to re-evaluate, and if necessary recommend changes, to ensure that international human rights obligations are taken into account in the development and implementation of Government policy and New Zealand legislation;
4. to re-evaluate the internal structure and operation of the various components of the Human Rights Commission and its relationship with other human rights agencies; and
5. to consider the possible implementation of a National Plan of Action for the Promotion and Protection of Human Rights as recommended by the United Nations World Conference on Human Rights.

The Team travelled throughout New Zealand conducting meetings for public consultation with stakeholders, including Governmental agencies, non-Governmental community groups, and individuals with a particular interest in human rights.

After a concentrated time of consulting and writing, the Team produced its Report "Discussion Paper: Re-Evaluation of the Human Rights Protections in New Zealand" in October 2000. In general terms, the Report found that:²²

1. the existing domestic Human Rights institutions in New Zealand were fragmented in nature;

²¹ For the full Terms of Reference see: Ministry of Justice, "Discussion Paper: Re-Evaluation Of The Human Rights Protections In New Zealand", a Paper prepared by the Ministerial Re-Evaluation Team for the Associate Minister of Justice (October 2000): 16-17.

²² Memorandum for Cabinet Policy Committee, "Re-Evaluation Of Human Rights Protections In New Zealand - Strategic Overview Decisions", (Paper One) (5 October 2000).

2. New Zealand's human rights obligations, and in particular the relationship between the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, were not well understood by the public, politicians or many government departments; and
3. there was a need for greater public education and debate regarding New Zealand's domestic and international human rights obligations so that they could be better considered and more realistically applied in both the public and private sector.

Key amongst the Team's recommendations were proposals to:²³

1. repeal section 151 of the Human Rights Act 1993;²⁴
2. amend the Human Rights Act 1993 so that legislation and Government policy and practice would be assessed against the New Zealand Bill of Rights Act 1990 rather than the Human Rights Act 1993;
3. the promotion of, and education about, human rights generally; and
4. early consideration of human rights issues and obligations in the policy-making process, rather than waiting for cases to be taken to complaint or prosecuted in the courts in order to establish or confirm the level of human rights protection the State is obliged to provide for its citizens.

In response to the Report, the Human Rights Amendment Bill 2001 was introduced to Parliament on 16 August 2001. The Bill contained some very positive elements in relation to human rights generally in New Zealand. However, as a response to the "Compliance 2001" Programme, and as a signal of the Government's commitment to equality under the

²³ For the full list of recommendations see: Ministry of Justice, "Discussion Paper: Re-Evaluation Of The Human Rights Protections In New Zealand", a Paper prepared by the Ministerial Re-Evaluation Team for the Associate Minister of Justice (October 2000): 94-106.

²⁴ The Human Rights Act 1993 s.151 was a 'sunset clause' that would automatically expire at midnight 31 December 1999. It was anticipated that all New Zealand statutes would be reviewed by this date and that, by this time, all would be amended to be compliant with domestic human rights provisions, or would be non-compliant only where that was justifiable.

law for gays and lesbians (and same-sex couples) the new legislation, which came into effect on 1 January 2002, was disappointing.

The positive attributes of the legislation included that:

- it did not extend the life of the sunset clause and, as a consequence, Government became subject to the anti-discrimination provisions of the Human Rights Act 1993, and could be held liable for any breaches of these provisions in the public sector;
- this Government liability was now to be tested against the anti-discrimination standard set out in Part 1A of the Act, namely, the Bill of Rights standard;²⁵
- the Human Rights Review Tribunal would not have the power to declare a legislative provision to be inconsistent with the Human Rights Act – that is, make a ‘declaration of inconsistency’.²⁶

Not so positive, however, was the fact that prior to the Human Rights Amendment Act 2001, of the 140 statutes which contain provisions which constitute entitlements for legally married couples,²⁷ nine also applied to same-sex couples. The Human Rights Amendment Act 2001 increased that number by 11. This meant that, although the temporary exemption from liability for discrimination by or on behalf of Government had expired, only 20 out of a possible 140 statutes could be said to be compliant.

As of 1 January 2002, therefore, the Government of New Zealand entered into a situation where it was in breach of New Zealand human rights law. Some 120 out of a possible 140 statutes remained inconsistent with the Human Rights Act 1993, and none of them had been granted a permanent exemption from compliance.²⁸

²⁵ That is, different treatment may occur only where that different treatment can be “demonstrably justified in a free and democratic society”: New Zealand Bill of Rights Act 1990: s.5.

²⁶ The Tribunal does not have the power to strike down or overturn an inconsistent provision, but a Declaration of Inconsistency by the Human Rights Review Tribunal must be reported to the responsible Minister along with suggestions on what the Government’s response(s) should or might be.

²⁷ Note, that this reference is to statutes only, and does not refer to the additional number of regulations or Government practices and procedures.

²⁸ This figure does not take account of any regulations promulgated under statute, nor any Government practices and procedures that should also have been the subject of consideration under the “Compliance 2001” Programme.

When asked about past delays and future plans relating to addressing these inconsistencies, the Ministry of Justice responded:²⁹

There was not time to do this work for inclusion in the Human rights Amendment Bill as the timeframe was driven by the need to address the expiry on 31 December 2001 of Government's partial exemption from the Human rights Act (section 151).

Consequently, Government agreed that only those references to "spouse" and associated words that were relatively simple and non-controversial to change would be done as part of the Human Rights Amendment Bill by 31 December 2001.

*The Ministry of Justice is undertaking work to assess other instances of legislative provisions that may treat de facto and same-sex couples differently from legally married couples and their families. This assessment includes the appropriateness of changing a provision to include same-sex couples and de facto heterosexual couples, and the development of options for how to give effect to such changes. **A timetable for progressing this work is currently under consideration.** As noted above there is also a process underway to audit and address Government policies and practices. (Emphasis added)*

This consistency / compliance process began with passing of the Human Rights Act 1993. To claim that there had been insufficient time, and to state that the Government was 'considering a timetable' for progressing this work some 8½ years later was indicative of a lack of commitment to human rights compliance in practice, and demonstrated that the driving force for human rights compliance in New Zealand was not, in fact, the legislative imperatives of the Human Rights Act but, rather, the politics of being in Government.

Property (Relationships) Bill 2000

In early 2000, the new Government revived the relationship property debate when it announced a proposal to include same-sex couples in the

²⁹ New Zealand Ministry of Justice letter to Nigel Christie on 22 November 2001 in response to a request under the Official Information Act 1982 for information on progress on the "Compliance 2001" Programme as it relates to same-sex couples. Note that the term "a number of" applies to the 11 statutes previously mentioned.

property legislation, and to combine the Matrimonial Property Amendment Bill and the De Facto Relationships Property Bill into one piece of legislation (Supplementary Order Paper No.25).³⁰ The proposed legislation provided for:

- the division of property upon the break down of a relationship – by amendment to the Matrimonial Property Act 1976 and the inclusion of provisions for de facto different-sex and same-sex relationships;
- the division of property upon the death of one partner – by way of amendment to the Matrimonial Property Act 1963, the Family Protection Act 1955 and the Administration Act 1969; and
- matters relating to spousal maintenance – by amendment to the Family Proceedings Act 1980.

On 4 May 2000, in spite of an initial outcry from the opposition parties about the process, the House voted 64-54 in favour of allowing SOP 25 (renamed the Property (Relationships) Bill 2000) to proceed. Further lobbying by opposition parties resulted in the Bill being referred back to the Justice and Electoral Reform Select Committee for further submissions. Parliamentary Select Committees are appointed from among MPs. Different Committees are responsible for considering a range of issues, including proposals for new legislation, which they can do in more detail than is possible in the House.³¹ The Committees will take into account the research, analysis and advice of officials but, unless the commitment to human rights standards is robust, there are three key ways in which the outcome of a Select Committee process will tend to result in support of a majority view rather than minority protection:

- The process enables members of the public to have direct input by way of written and / or oral submissions.

³⁰ See earlier discussion on the former Government's initial work on separate matrimonial and de facto relationship property legislation in the previous chapter.

³¹ New Zealand Parliament website, "How Parliament Works: Fact Sheets: Select Committees":

http://www.parliament.nz/en-NZ/AboutParl/HowPWorks/FactSheets/3/f/a/3faad934f46f4612ad8180cb294638fd.htm#_Toc144018583 (Retrieved: 13 August 2009).

- By their very definition, MPs are the representatives of their constituents and may, therefore, tend to reflect the views of the people they represent.
- The decisions of Select Committees, like decisions of the House, are made on a majority-vote basis.

Disappointingly in this case, there were several changes made to the Bill by the Select Committee. These changes were not made on a principled basis to enhance the Bill and its future operation, but rather to appease conservative critics of the Bill.³²

Firstly, the Bill, as originally drafted, used the generic term “partnered relationship” to cover marriage, de facto heterosexual, and same-sex relationships,³³ and defined a person as another person's “partner” if “(a) they are married to each other; or (b) they have a de facto relationship with one another”.

However, the fact that two persons married to each other should be described as “partners” in the same way as two persons in a de facto relationship or a same-sex relationship created some consternation amongst opponents. As a consequence of lobbying both within Parliament from opposition parties and from outside by conservative groups, the Select Committee reintroduced the terms “husband” and “wife” in relation to married couples only. This change stemmed from a fear that the inclusion of same-sex couples in relationship property legislation was a threat to the sanctity of marriage. One of the key advocates of this change was Rt Hon Jenny Shipley, Leader of the Opposition, who stated:³⁴

I do believe that there is a significant difference in the characteristics and the uniqueness of each of these relationships. [Married people] make a commitment, and it is an obvious commitment – a higher level of commitment – than people who enter other relationships.

³² The following is based on: Supplementary Order Paper No.25, as drafted prior to Select Committee deliberations; Supplementary Order Paper No.25, as reported from the Justice and Electoral Select Committee.

³³ Supplementary Order Paper No.25 cl.4.

³⁴ New Zealand National Party, Press Release (3 March 2000).

But, the reintroduction of these specific terms effectively reintroduced an element of discrimination into the legislation by recreating the separation between “marriage” and “relationships in the nature of marriage”. Fortunately, the substantive treatment within the legislation of “partners”, or a “husband” or “wife”, remained the same in all instances with the eventual effect that all relationships were still to be treated the same way under the new legislation.

A second change resulted in the insertion of a definition of a ‘de facto’ relationship. The original draft of the Bill defined a de facto relationship as one in which “two people (whether a man and a woman, or a man and a man, or a woman and a woman) are living together in a relationship in the nature of marriage although not married to each other”.³⁵ This “open” definition had its flaws. The term ‘de facto’ is short-hand for de facto marriage (as compared with de jure marriage). If same-sex couples cannot marry de jure, then nor can they be in a de facto marriage.

However, the Select Committee responded to a call to insert an express definition. This express definition also has its flaws.

The Court of Appeal in Thompson v Department of Social Welfare³⁶ listed a range of “characteristics” of a “relationship in the nature of marriage” (a de facto relationship). What Justice Tipping did in that definition was to quite clearly state that there are two fundamentally different categories of characteristics of any relationship.

First, he referred to the “mental” (emotional and psychological) characteristics such as commitment to each other, including the notions of loving, sharing and caring.

Second, he referred to the “physical” characteristics such as whether or not the couple share a home, whether they own property together, whether they have joint bank accounts, whether they hold themselves out to family and friends as a couple, and so on.

For those of us who seek legal recognition of same-sex relationships through marriage this distinction is central. It is the core elements of the relationship that are paramount in our considerations – the “mental”

³⁵ Supplementary Order Paper No.25 clause 2A(2).

³⁶ Thompson v Department of Social Welfare [1994] 2 NZLR 369: 373.

characteristics. The relationship commences with the love, sharing and commitment. It is those which are the relationship. It is those that give the relationship its status in the eyes of family and friends.

The “physical” characteristics are the incidents and, generally, the indicators of that relationship. They are not the essence of that relationship.

It was disappointing therefore, to see “the degree of mutual commitment to a shared life” being included within the definition as the only indication of the “mental” element of the relationship, and being listed as merely the sixth in a list of nine characteristics

The Select Committee reported to the House on 14 November 2000. In spite of these shortcomings, the legislation was arguably the first family-related legislation in New Zealand which was truly compliant with our human rights laws.³⁷

Acknowledgement compared with recognition

Until the advent of the Civil Union Act 2004 and the Relationships (Statutory References) Act 2005, all legislation which contained some provisions relevant to same-sex partners could be described in terms of the obligations, and conversely the rights, of one partner of the relationship vis-à-vis the other partner (as in relationship property legislation, domestic violence), or to the State (as in income tax legislation), or in relation to the rights of a third party (as in the rights of a child to be supported). In many instances, the statutes related to the rights of individuals in a relationship when something went wrong (domestic violence), or when a relationship came to an end (property).

It is argued that the inclusion of provisions relating to same-sex partners in various pieces of legislation should be seen as an acknowledgement of

³⁷ The only statutes which had previously included same-sex couples were: Electricity Act 1992 s.111 (definition of a “near relative”); Domestic Violence Act 1995 s.2 (definition of “partner”); Harassment Act 1997 s.2 (definition of “partner”); Accident Insurance Act 1998 s.25 (definition of “spouse”); Housing Restructuring (Income-Related Rents) Amendment Act 2000 s.5 (definition of “partner”).

these relationships and the individuals within them, rather than as a recognition of the relationship per se.

While it may be tempting at times to celebrate the inclusion of same-sex couples in the law (either expressly in statute, or through an inclusive interpretation by case-law), that inclusion may not always be as positive as first seems.

There is generally no issue with the expectation that gays and lesbians should be required to respond to any and all obligations and responsibilities flowing from the law, but there is some resentment to having to respond to the obligations when not receiving the rights, benefits and protections that other couples receive (and take for granted) from the State.

Relationship recognition

On 9 December 2004, Parliament passed the Civil Union Act 2004. On 15 March 2005, Parliament passed the Relationships (Statutory References) Act 2005. The Civil Union Act enables same-sex couples and different-sex couples to register their relationships with the State by way of a process that is similar to, but different from, that for marriage under the Marriage Act 1955. The Statutory References Act, by a series of consequential amendments, extended a range of legislation which previously applied to either married couples (or, in some cases, to married and de facto different-sex couples) to apply to couples who entered into a civil union.

In the midst of the promotion of the Civil Union Act, we were led to believe that, by registering a relationship under the Civil Union Act 2004, same-sex couples can now gain access to all the essential obligations, protections, benefits which flow from marriage. However, this is clearly not the case.

Leaving aside the Marriage Act, of approximately 150 statutes, there are about 15 statutes the provisions of which have not been extended to

couples who enter a civil union. There are exclusions which may not be hugely significant in the wider scheme of things. However, the significant impact of some of these exclusions is unquestionable and, arguably, these exclusions constitute continued discrimination against same-sex couples.

Legislation from which same-sex couples remain excluded

The most obvious and significant example of legislation from which same-sex partners are *prima facie* excluded (whether in a civil union or not) is the Adoption Act 1955. Under that Act and, until very recently at least, the case-law has held that, only married couples were able to make a joint application for adoption.³⁸

My analysis of legislation affecting relationships or partners to a relationship identified the following are examples of legislation which continues to exclude same-sex couples because of the case-law definition of the term “spouse”:³⁹

- Adult Adoption Information Act 1985 s.2 – provides that, where one person adopts a child as a sole applicant, their spouse will not become a parent of that child by reason only of having consented to the adoption and, that a person who becomes the spouse of a sole applicant adoptive parent after the adoption has taken place will not, by virtue of that relationship, become a parent of the child.

³⁸ See detailed discussion in relation to the Adoption Act 1955 later in this Chapter.

³⁹ I compiled this list by analysing the statutes held in the online database at <http://www.legislation.govt.nz/default.aspx> (Retrieved: 13 August 2009). I do not claim that the list is exhaustive, but suggest that it captures most of the statutes that have not been amended to include same-sex couples. Those statutes referred to in the main text are those that are perhaps more likely to remain of some consequence to same-sex partners. Some of the statutes identified may be of little consequence for same-sex partners and I have included these in this footnote only, merely to assist in pointing out that full compliance still has not been reached. These include: Cook Islands Act 1915 (relating to adoptions); Land Transfer Act 1952; Mortgages and Lessees Rehabilitation Act 1936; Family Benefits (Home Ownership) Act 1964 s.16; Farm Ownership Savings Act 1974 s.5 and s.6; Fishing Vessel Ownership Savings Act 1977 s.6; Home Ownership Savings Act 1974 s.2; National Expenditure Adjustment Act 1932 s.42.

- Commerce Act 1986 s.106 – provides for the inadmissibility, in criminal proceedings against an individual or that individual's spouse, of evidence adduced for proceedings before the Commerce Commission.
- Diplomatic Privileges and Immunities Act 1968 s.19 – provides for exemptions from certain taxes, duties, levies and fees for specified individuals and members of their family, with family defined as being spouse or any dependent children of the individual concerned.
- Domicile Act 1976 s.5 – abolishes the 'rule of domicile' whereby, upon marriage, the wife acquired her husband's domicile, and provides that every married person is capable of having an independent domicile.
- Joint Family Homes Act 1964 s.12A – provides that where a husband and wife purchase a property as a joint family home and one of them dies within 6 months of purchase, the land may be transferred into the sole ownership of the surviving spouse.
- Life Insurance Act 1908 s.67 – provides that a parent or guardian or both together, or a (separated) parent or guardian with their spouse, may take out a life insurance policy on the life of a minor child.

Care of Children Act 2004 and Status of Children Act

On 21 November 2004, the Guardianship Act 1968 was replaced with the new Care of Children Act 2004. The Guardianship Act was based on "a traditional nuclear family model that does not reflect the diversity of family arrangements that now exist in New Zealand",⁴⁰ and the need for new, more responsive, legislation was recognised. Key drivers for the new legislation were that:

- legislation needed to ensure a stronger focus on the rights of children;

⁴⁰ Ministry of Justice, "Briefing On The Care Of Children Bill", (2003), <http://www.justice.govt.nz/pubs/reports/2003/care-of-children/briefing.html> (Retrieved: 7 January 2004).

- legislation needed to emphasise parental responsibilities rather than parental rights; however
- legislation needed to ensure that all types of family arrangements are recognised and catered for;

As a result, the new legislation brought in key changes to include same-sex partners and families within the ambit of the Act. The changes, potentially, relate to situations where a child of one parent comes into a reconstituted family arrangement with that parent, or where a child is born to one partner during the same-sex relationship by way of assisted reproduction.

Children brought to the relationship

Under the Guardianship Act, where one partner to a same-sex relationship brings a child to that relationship, their former partner retained legal guardianship. This continues under the Care of Children Act.

Under the Guardianship Act, the new partner of the birth parent needed to apply to the court to be appointed an additional guardian.⁴¹ This also continues under the Care of Children Act, however, there is a difference in the way in which these provisions are to be applied. Previously, courts were reluctant to acknowledge a same-sex partner to a parent of a child as an additional guardian. Essentially, in order to do this, the court required the consent of the former partner – which was not generally forthcoming.

Previously, also, in order to gain a legal connection to the child as an additional guardian, the eligible partner had to apply to the court for, and be granted, additional guardianship. The granting of parental connection to the child therefore lay with the court's discretionary assessment of whether or not the best interests of the child would be served by granting additional guardianship to a same-sex partner.⁴²

⁴¹ Guardianship Act 1968 s.8.

⁴² Guardianship Act 1968 s.8.

While the former partner still retains guardianship rights under the Care of Children Act 2004 and has a right / responsibility to be involved in decisions relating to the welfare of the child,⁴³ the new legislation also makes it clear that same-sex partners must not be excluded solely on the basis that they are of the same gender as the child's parent.

The new legislation is quite clear that an "eligible partner" can be appointed as an additional guardian.⁴⁴ It is also clear that a partner is an eligible partner of a parent if "the parent making the appointment shares responsibility for the child's day-to-day care, and has done so for not less than 1 year".⁴⁵ The legislation is also clear that a partner can be a partner of the same gender.⁴⁶ Thus, a gay male partner of a male parent, or the lesbian female partner of a female parent can more easily become a guardian to a child who is brought to the relationship by his or her parent.

Additionally, under the Care of Children Act 2004, a same-sex partner of a parent of a child is enabled to apply, as of right, for a parenting order in relation to their partner's child.⁴⁷ This was not the case under the equivalent provision of the Guardianship Act 1968 under which the partner needed to apply to the Court for leave to apply for a custody order.⁴⁸ This application as of right persists even if the same-sex partner is not a guardian of the child.

⁴³ Guardianship Act 1968.

⁴⁴ Care of Children Act 2004 s. 23(1)(a).

⁴⁵ Care of Children Act 2004 s.23. Note that there are disqualifying criteria also, including: never having been involved in proceedings under the Care of Children Act 2004 or the Children, Young Persons, and Their Families Act 1989; never been a respondent in Domestic Violence Proceedings; and never been convicted of and offence involving harm to a child.

⁴⁶ Care of Children Act 2004 s.8 and s.9: Section 8 provides that "a partner of a parent means a person who is not also a parent of the child but who shares responsibility for the child's day-to-day care with the parent and ... is living or has lived with the parent as his or her de facto partner"; Section 9 provides that "a de facto relationship is a relationship between 2 persons (whether a man and a woman, or a man and a man, or a woman and a woman)", in accordance with other prescribed criteria.

⁴⁷ Care of Children Act 2004 s.47(1)(c). Persons able to apply under this provision, as of right, include: (a) a parent of the child ; (b) a guardian of the child: (c) a spouse or partner of a parent of the child. Persons able to apply under this provision, with leave of the Court, include: (d) any other person who is a member of the child's family, whanau, or other culturally recognised family group; and (e) any other person.

⁴⁸ Guardianship Act 1968 s.11(1)(b).

Children born to the relationship

Assisted reproductive technology means that a number of same-sex couples are now having children within their relationships. This is much more common with lesbian women who can conceive by way of donor insemination, than with gay men who, in order to have a biological child, must rely on surrogacy.

Formerly, as the result of the interface of the Guardianship Act 1968, the Births, Deaths and Marriages Registration Act 1995, and the Status of Children Act 1969, a male partner to a woman who conceived by artificial insemination (the male partner not being the sperm donor) could be named on the child's birth certificate and be a guardian to the child providing he was married to, or living in a marriage-like relationship with, the mother at the time of the birth of the child. In fact, his consent to the birth technology was presumed; he was legally the parent / guardian of the child unless he could rebut the presumption of his consent to the procedure. However, the female partner of the mother of children born to the relationship by artificial insemination was not presumed to be a parent or guardian of the child even if she had been living with the birth mother throughout the period from conception to birth and fully consented to the procedure.

This meant that a birth mother's lesbian partner (as a co-caregiver and de facto custodial parent of a child) was considered legally to be in a position secondary to that of an absentee father (who may in some instances demonstrate no desire to be involved in the day-to-day care of the child) when it comes to decisions in relation to that child's upbringing.

Under the Status of Children Act 1969 (as amended by the Status of Children Amendment Act 2004):

- An ovum donor for a woman with whom she was not a partner at the time of conception is not, purely by virtue of a biological link, a guardian of the child whether or not the woman is in a relationship with another person;⁴⁹ however

⁴⁹ Status of Children Act 1969 s.19.

- the ovum donor becomes a guardian of the child if she subsequently becomes a partner to the child's mother.⁵⁰
- If the birth mother is in a *de facto* relationship with another woman at any time during her pregnancy, her *de facto* partner can become a guardian and parent of the child upon appointment by the birth-mother.⁵¹ The *de facto* partner's name can be registered on the child's birth certificate.⁵²
- A sperm donor for a woman with whom he is not a partner at the time of conception is not, purely by virtue of a biological link, a guardian of the child whether or not the woman is in a relationship with another person;⁵³ however
- the sperm donor becomes a guardian of the child if he subsequently becomes a partner to the child's mother.⁵⁴
- If the woman is in a relationship with another man (not the sperm donor) at any time during her pregnancy, that man becomes a guardian and parent of the child, whether or not he is the genetic father of the child.⁵⁵ The partner's name can be registered on the child's birth certificate as a parent.⁵⁶

Thus, the law has changed from recognising the donor biological father ahead of the birth mother's same-sex partner (if anyone is to be officially recognised), to recognising the partner of the birth mother rather than the sperm donor biological father.

⁵⁰ Status of Children Act 1969 s.20.

⁵¹ Care of Children Act 2004 s.23.

⁵² Information on ability of a 'de facto' same-sex step-parent to be registered on a child's birth certificate was provided by the Office of Births, Deaths and Marriages, Department of Internal Affairs by telephone conversation (Matthew) (19 January 2006).

⁵³ Status of Children Act 1969 s.21.

⁵⁴ Status of Children Act 1969 s.22.

⁵⁵ Care of Children Act 2004 s.17.

⁵⁶ Status of Children Act 1969 s.18: When a woman in a relationship with a male partner becomes pregnant as a result of an AHR procedure, and the semen used for the procedure was produced by a man who is not the woman's partner, and the woman has undergone the procedure with her partner's consent, the woman's partner is, for all purposes, a parent of any child of the pregnancy.

Status of Children Act 1969 s.27: The consent of the birth mother's partner is presumed in the absence of evidence to the contrary.

It should be noted that the key difference that remains is that the Care of Children Act 2004 does not enable a same-sex partner of a birth mother to automatically become a guardian of the child upon its birth (although the birth mother has the ability as a sole parent, to appoint her partner as an additional guardian), whereas a different-sex partner of the birth mother automatically becomes a guardian so long as he has been living in a relationship with her for all or part of the period between conception and birth.

Summary

These changes from the provisions under the now repealed Guardianship Act 1968 to the current Care of Children Act 2004, while similar with regard to most of their procedural requirements, signify a move away from the former adherence to the nuclear family structure, either directly or by implication, and greater recognition of alternative family forms. In the main, the provisions cater for a similar degree of acknowledgement and recognition for same-sex families as compared with different-sex families. Generally, the provisions reflect the reality of the family as constituted through birth or through alternative reproductive technology, rather than adhering to, or giving prominence to, birth relationships ahead of functional relationships.

Surrogacy

The potential for becoming a parent by way of surrogacy also creates its own complications. Surrogacy is an informal arrangement and is not enforceable under New Zealand law. Rather, the relationship of the birth-mother and the intended parents to the child is established by way of guardianship or adoption. Whether or not the surrogate birth-mother is a genetic parent to the child to whom she gives birth is inconsequential to her status as a legal parent of the child. She will be a legal parent and guardian of the child until such time as that relationship is formally and

legally severed. The legal possibilities for the intended family are as follows:⁵⁷

- If they are a married couple, they may adopt the child, in which case the birth-mother will cease to be a legal parent of the child.
- If they are a female same-sex (lesbian) couple, subject to the agreement of the birth partner and the approval of the Family Court, either:
 - both partners could be granted additional guardianship and parenting orders; or
 - one partner could adopt and the other partner could become an additional guardian.
- If they are a male same-sex (gay) couple, and if the child is a boy, subject to the agreement of the birth partner and the approval of the Family Court, either:
 - both partners could be granted additional guardianship and parenting orders; or
 - one partner could adopt and the other partner could become an additional guardian.

While the Status of Children Act 2004 provides mechanisms for the legal parenting arrangements where one partner to a relationship is the birth mother by donor, parenting by surrogacy again relies on the Adoption Act 1955 and / or the Care of Children Act 2004 (or, alternatively, the Children, Young persons and Their Families Act 1989 which contains provisions relating to guardianship).

⁵⁷ Information from: Ministry of Social Development, and Whitireia Community Law Centre, "About Us: Sexual Orientation, Gender Identity and the Law in New Zealand" (October 2008), http://www.communitylaw.org.nz/fileadmin/documents/About_Us_27Aug08V2.pdf (Retrieved: 22 August 2009); and with reference to the Adoption Act 1955, Status of Children Act 2004, Care of Children Act 2004, and Children, Young Persons and Their Families Act 1989.

Regaining Momentum?

Hate crimes legislation

On 1 May 2001, Parliament passed the Sentencing Act 2002. The Act introduced hate crimes legislation into New Zealand for the first time. Prior to the passing of this legislation, the closest New Zealand had to hate crimes legislation was the Harassment Act 1997, and the inclusion in the Human Rights Act 1993 s.131 of provisions such as those relating to the incitement of racial disharmony.

Under the new legislation, the fact that a crime is deemed to be a hate crime can act as an aggravating factor in relation to sentencing. Section 9(1) of the Sentencing Act 2002 provides:

In sentencing or otherwise dealing with an offender the court must take into account the following aggravating factors to the extent that they are applicable in the case: ...

(h) that the offender committed the offence partly or wholly because of hostility towards a group of persons who have an enduring common characteristic such as race, colour, nationality, religion, gender identity, sexual orientation, age, or disability; and

(i) the hostility is because of the common characteristic; and

(ii) the offender believed that the victim has that characteristic:

Hate crimes are essentially crimes against an individual that are motivated by a hatred towards a group to which the individual belongs, or is thought to belong. A hate crime, therefore, is an attack on the individual and the individual's identity. It is more than just a physical attack, and is a "message" crime, designed to instil fear into the victim by:⁵⁸

sending a message to members of a given group that they are unwelcome and unsafe in a particular neighbourhood, community, school, workplace, or other environment.

⁵⁸ American Psychological Association, "The Psychology Of Hate Crimes" (2009), <http://www.apa.org/ppo/pi/hate-crimes-faq.pdf> (Retrieved: 19 August 2009).

Gays and Lesbians are still facing issues as individuals, couples and communities in New Zealand society. The place of gays and lesbians today society can be gauged in different ways, depending on the questions asked.

The fantasy

If asked about whether or not they believe that, during their lifetimes, social attitudes have changed positively towards homosexuality and towards gays as persons, most gay men would probably have to answer in the affirmative. This would be more likely be true of older gay men – especially those who remember the pre law reform days. I have had conversations with gay men who have recounted stories, when homosexual acts between consenting male adults were still criminal acts, about being asleep with their partner in their home and being awoken by a knock on the door. One partner might answer the door to find a policeman standing there asking whether any disturbance had been overheard from the house next door which had been broken into. For the person answering the door, the immediate fear would be the possibility of the police discovering the presence of a male partner in his bed. Once the door is closed, there might be a big sigh of relief, and the resolution to be even more secretive about the relationship.

In this sense, clearly things have improved. In most instances, providing we live quiet lives behind our garden fences, society is not really interested in what happens in our private lives.

The reality

However, another way of assessing the extent to which things have ‘improved’ for gays in New Zealand is to consider the worst case scenario. That is, gays and lesbians either being killed or subjected to serious violence because of their sexual orientation. Such an assessment paints quite a different picture. However much the “improvements”, we still have

the reality of gay men being attacked and killed for no reason other than their sexuality.

There have been sufficient examples in recent years for us to know that New Zealand is not safe – that homophobia is alive and well (and sometimes legitimised by juries and judges):⁵⁹

- Jeff Whittington, aged 14 years, killed in Wellington (May 1999). Whittington's two attackers assaulted him by punching and kicking him, causing severe facial and head injuries, and abdominal injuries causing a perforated bowel. Boot marks were found on his skulls after one of the attackers had jumped on his head. The attackers later declared that they had "fucked up a faggot and left him for dead" and that "The faggot was bleeding out of places I have never seen before". The attackers sought manslaughter verdicts, based in a homosexual panic defence, but were convicted of murder and, in December 1999, were sentenced to life imprisonment.
- Peter Kitchen killed in Napier (April 2001). Kitchen and a friend were attacked by three young men (aged about 20). Kitchen later died in hospital. The attackers were heard saying "Let's fuck these gay guys up". In May 2002, one of the attackers received a prison sentence of three and a half years. The other two attackers received a sentence of 1 year each in prison.
- Jason Johnson killed at Whakamaru (July 2001). Johnson had been "killed in an extremely violent attack" and his body subsequently found submerged in Lake Whakamaru near Mangakino. His convicted killer did plead the homosexual panic defence but, in June 2002, was sentenced to life imprisonment for murder.
- Colin Hart killed in Mangere (October 2003). Hart's attacker stabbed him repeatedly. After successfully pleading the homosexual panic defence the attacker was convicted of manslaughter rather than murder and, in August 2004, was sentenced to three years' imprisonment.

⁵⁹ Information from: Bennachie, Calum, "Anti-Gay Hate Crimes 1990-2001" (www.gaynz.com/archives/hate_crimes.asp) (Retrieved: 10 July 2004); and Sensible Sentencing Website (www.safe-nz.org.nz/Data/vodb.htm) (Retrieved: 10 July 2004).

- David McNee killed in Auckland (July 2003). McNee's attacker had hit him in the head up to 50 times, and left him to die. After pleading the homosexual panic defence, the attacker was found not guilty of murder but of manslaughter and, in September 2004, was sentenced to 9 years in prison (with a minimum term of 4½ years);
- James Bamborough killed on the West Coast of the South Island (1999). Bamborough's attackers took him by car from Westport to the Buller River. One of the attackers dragged him from the car into the river, held him under the water and strangled him. The two attackers, self-confessed white supremacists, despised non-whites and homosexuals. Before the attack, the men had been overheard saying they were going to get Bamborough because they didn't like 'faggots', and afterwards one of the attackers (McKenzie) joked about having "killed a faggot". Bamborough was described to the Court as a 'flamboyant homosexual'. In June 2005, the two men were sentenced to life imprisonment.
- Robert Hunt killed in Auckland (July 2004). His attacker held him by the throat and stabbed him 42 times. The attacker attempted to use the homosexual panic offence but evidence showed that he had visited Hunt numerous times for sex. He had a history of engaging in sexual encounters for money and, on this occasion, had left the scene taking money and his victim's car. He was found guilty of murder and, in October 2005, was sentenced to prison for a minimum of 17 years.
- Robert Greene murdered in Kaikohe (August 2004). The dairy farmer, who worked for Greene, said that he had put up with sexual advances from Greene for years but, on the day of the killing he had woken up to find Greene in his bed with him, naked from the waist down. The jury denied the homosexual panic defence and, in October 2005, the attacker was sentenced to 17 years non-parole imprisonment for murder.
- Stanley Waipouri killed in Palmerston North (22 December 2006). On 22 July 2008, a High Court jury in Palmerston North found Andre

Gilling, aged 18, guilty of the murder of Stanley Waipouri. Another youth, Ashley Arnopp, had already pleaded guilty to the murder. The victim, a gay man aged 39, died from head and neck injuries after being kicked, punched and stomped to death for over an hour. The tip of his penis and an earlobe were also missing. A close friend of the victim said that it had been hard listening to the indignities his friend had suffered, and: "If people want the definition of hate, read about the death of Stanley Waipouri".⁶⁰

- Ronald Brown killed in Auckland (December 2007). The victim had been assaulted and had a large blood clot inside the left side of his skull, a 6cm laceration on the top of the skull, a 3cm laceration above the left eye and an 8cm neck wound. The wounds were consistent with being hit with a blunt instrument "with considerable force". The victim died two days after the attack when his life support was switched off. On 9 July 2009, Ferdinand Ambach, 32, was found not guilty of murdering Ronald Brown, 69, but guilty of manslaughter. Ambach used provocation as a defence, saying that Brown came close to him and touched his thigh and fondled him.

Giving such detail in these examples may appear somewhat sensational, but they, and the fear of serious assault, do constitute part of the reality of what it is to be a gay man, or even to be perceived to be a gay man, living in New Zealand today. It should be noted that all of the killings listed above have happened in a 'tolerant' New Zealand within the period of the last 10 years.⁶¹

Unfortunately, when these homicides have come before the Police and the courts, the response has often been to refuse to believe that the homicide is linked to the fact or perception that the victim is gay,⁶² or to imply that

⁶⁰ The Dominion-Post, "Family Relief As Teen Found Guilty Of Murder": <http://www.stuff.co.nz/national/544390> (Retrieved: 22 July 2008).

⁶¹ It should also be noted that the list is non-exhaustive in that it does not include every homicide resulting from a hate-motivated attack in New Zealand during this time.

⁶² As was the case with the Whittington murder, with the family and the Police not acknowledging in the early stages of the investigation that Whittington was gay or that he was attacked because he was gay, or even that he was attacked because he

that the victim somehow brought the attack on himself.⁶³ In many instances the attacker pleads the “homosexual panic defence”⁶⁴ as means of “excusing” himself from some of the blame.⁶⁵

It must be remembered also that, while the examples above may represent the extreme cases (because they have resulted in death to the victims), there is evidence that there are many other attacks on gays and lesbians, physical or non-physical, reported or unreported, which result in non-fatal injury or trauma to the victim.⁶⁶ These other less sensational and less visible examples of how society acts towards gays occur with a much greater frequency and affect a greater number of people. Many of these examples remain less visible because they are perceived to be less significant in their impact on the individual. Many remain totally invisible, because the individuals affected do not take action, either because they are not “out” and do not want to be doubly victimised by homophobic reactions when their friends and families discover that they are gay or because they do not feel assured that they will get a favourable response from investigating authorities.

was perceived by his attackers to be gay.

⁶³ As was the case in the Johnson murder, Johnson being described by the Police as a “known and promiscuous homosexual”.

⁶⁴ “Homosexual Panic Defence” is the term used when a heterosexual male attacker claims that he attacked his victim because the victim made homosexual advances towards him. The defence is one that suggests that the attacker was provoked by the homosexual advance and therefore has a defence for the attack. It also serves to redefine the attacker as the victim and the victim as the attacker.

⁶⁵ As was the case in the David McNee homicide, where Philip Edwards was found guilty of manslaughter rather than murder because he pleaded the homosexual panic defence. It is interesting to note that the defendants in more recent cases appear to have been unsuccessful in pleading the homosexual panic defence. While the hate crime provisions included in the Sentencing Act 2002 may have an indirect influence on perceptions towards hate motivated crime, the level of impact remains to be seen.

⁶⁶ For example, Inside-OUT, “A Report on the Experiences of Lesbians, Gays and Bisexuals in America and the Public’s Views on Issues and Policies Related to Sexual Orientation”, (c.2002), found that of the gay, lesbian and bisexual participants, “About one third (32%) say they have been the target of physical violence, either against their person or property, because someone believed they were gay or lesbian”; and “More than one third (39%) report being “very” or “somewhat” worried that they may be physically assaulted or beaten by someone who does not like gay people”.

The messages

In general, there is good purpose to be served by hate crimes legislation. There is a need to establish tolerance levels, and this is one way of doing that.⁶⁷

Most of us agree that hate crimes represent the point at which we want the law to say ‘we simply will not tolerate this kind of behaviour’. At this point, it is important for the court to send a real message on fundamental values. There is a different moral quality and a different risk to society which we should be reflecting.

I have no desire, therefore, to suggest that this legislation is not worthwhile, or does not have a role to play. It is important to send a message that there is a zero tolerance for hate-motivated crime.

However, hate crimes legislation, by its very definition, is reactive in character. It is about taking action against a person in relation to an event that has already happened – the “ambulance at the bottom of the cliff”. It is about what action we can take if all else has failed – if the messages that we have attempted to impart (or should be imparting) have failed and, as a result, some persons choose to act contrary to the principles of respect and concern for the dignity of their fellow citizens.

However, it is of little direct and immediate benefit to a victim of such a crime that the perpetrator has been punished more severely than might have been the case if it were not a hate crime.⁶⁸ Such legislation is of little assistance to the victim of a gay-bashing unless it provides a remedy in relation to any disadvantage suffered by the victim, or it causes the victim to feel that the crime has been dealt to appropriately and satisfactorily. Of course, if the victim suffers permanent physical or

⁶⁷ Justice and Electoral Select Committee “Report On The Sentencing And Parole Reform Bill”.

⁶⁸ This in the same way that a law against murder is of very little use to the person who has been killed; or a law against assault, or grievous bodily harm, is of limited use to the person who is severely disabled, physically or mentally, from an attack; or a law against harassment is of limited use to a victim of harassment if that person’s self-esteem has been shattered to the extent that they are not able to function properly in the work-place. Domestic violence protections are of little use to partners in gay or lesbian relationships if the Police and the courts are not able to recognise when that law should be applied and how to apply it in an even-handed and meaningful way.

psychological injury, or even death, hate crimes legislation can never produce a result that will satisfactorily remedy the situation. In this sense, hate crimes legislation is absolutely not enough.

Surely, it is more sensible and more beneficial to all concerned to create a climate of acceptance in the expectation and hope that the hate crime will not be committed in the first place. That is, it is about much more than being reactive and having the right legislation in place to deal with the aftermath of abuse. It is about being proactive and making good use of the tools available to us to change the perceptions behind those victim crimes. It is about working proactively to remove the need for victims to report offences against themselves by preventing the offences from happening in the first place.

In the context of this thesis, it is not just about:

- ensuring that appropriate information is readily available to those who might need it about protections that are available;
- ensuring that appropriate information is readily available about how to access and employ those protections pre-emptively to prevent threats from being realised; and
- ensuring that support and enforcement agencies are not only free from homophobia but are perceived to be so by members of the gay and lesbian communities.

It is also about sending the right messages to society at large about acceptance of diversity and difference, and respect for fellow citizens. In relation to the treatment of gays and lesbians under New Zealand law, and again in the context of this thesis, it is about conveying the message that gays and lesbians as individuals and in their relationship, must be treated with equal dignity and respect. Parliament, by virtue of the legislation it passes, and by virtue of the legislation it does not pass, is conveying particular messages to the New Zealand and international communities.

On the one hand, Parliament is telling society that:

- it is not okay for individuals in New Zealand society to treat gays and lesbians less favourably than others on the basis of their actual or perceived sexual orientation; and
- it is prepared to punish more severely those who do demonstrate a lack of respect towards gays and lesbians through the perpetration of crimes against them.

But, on the other hand, Parliament is telling society that:

- despite the New Zealand Bill of Rights Act 1990 s.19, it is legitimate for Parliament to continue to treat gays and lesbians less favourably by denying full and equal relationship recognition through marriage for committed same-sex relationships; and
- it is prepared to declare gays and lesbians less worthy of equal recognition and respect than their heterosexual counterparts by denying full and equal relationship recognition through marriage.

Parliament is saying “we care about the way gays and lesbians are treated”, but we only care to the extent that we will grant them an inferior and discriminatory form of recognition through civil unions. A classic case of “do as I say, not as I do”.

The Adoption Act 1955

The changes to the Care of Children Act 2004 are of obvious benefit to lesbian parents, and their partners and children, in those situations where one partner brings a child to the relationship, or where one partner has a child by way of assisted reproduction. The Act also benefits gay men and their partners and children, where one partner brings a child to the relationship. The Care of Children Act 2004 along with the Status of Children Act also enables better legal relationships between male same-sex parents where a child is born to their relationship as a result of a surrogacy arrangement.

Another potential option for gay male partners who wish to have children and currently, obviously, cannot biologically have children of their own is the adoption of children.⁶⁹ However, adoption legislation in New Zealand has not undergone the same evolution as has the Care of Children Act 2004.

In summary, the Adoption Act 1955 provides:

- that joint applications for adoption can be made by spouses only⁷⁰ – with the term spouse currently being interpreted to mean married partners only;⁷¹
- for sole applications, in specified circumstances⁷² – one of the specified circumstances being that a sole applicant who is male may only adopt a male child.⁷³

The Adoption Act 1955 does not provide for second-parent adoption. If adoption is decided in favour of joint applicants or a sole applicant, the result is the severance of all legal ties with previous legal parents. No person may become an adoptive parent in addition to an existing parent.⁷⁴

For a period of time, the Family Court did extend the term “spouse” to include different-sex de facto partners on two occasions.⁷⁵ Subsequently, however, the Family Court has retracted the inclusion of different-sex de facto couples within the term “spouse”.⁷⁶ These later decisions were post the Quilter same-sex marriage case, but neither Judge cited the Quilter case as influencing their interpretation of “spouse”.

⁶⁹ Although this may change in the future. Scientists have discovered a method of creating an embryo using the DNA from two parents of the same gender. In the case of an embryo created from the DNA of two males, of course, a surrogate mother would still be required: The Guardian, “Embryo From Same-Sex Parents Tested” (10 September 2006).

⁷⁰ Adoption Act 1955 s.2 and s.3.

⁷¹ However, see discussion on recent development on this later in this section.

⁷² Adoption Act 1955 s.4.

⁷³ Adoption Act 1955 s.4(2).

⁷⁴ Adoption Act 1955 s.16.

⁷⁵ Re Adoption by Paul and Hauraki [1993] NZFLR 266; and In the Matter of J (Adoption) [1998] NZFLR 961.

⁷⁶ In the Matter of R [1999], and Re D (Adoption) [2000] NZFLR 529.

In 2000, the Complaints Review Tribunal (now known as the Human Rights Review Tribunal) held that only married couples could jointly adopt a child.⁷⁷ At that time, because of Human Rights Act s.151, the Tribunal had no jurisdiction to make a finding of unlawful discrimination, it stated that this provision “discriminates against other prospective joint applicants for adoption orders who are not married to each other”.⁷⁸

The Adoption Act 1995 was not included within the range of statutes amended by the Relationships (Statutory References) Act 2005. It has been stated that:⁷⁹

It is surprising that neither the Civil Union Act 2004, nor the Relationships (Statutory References) Act 2005 amends s.3 Adoption Act to allow couples who have entered a civil union to jointly adopt a child. The General Policy Statement which prefaces the latter Bill states that “As a result of the Bill, the same legal rights and responsibilities will apply to married, de facto (whether opposite or same sex, and civil union relationships”. In relation to eligibility to adopt a child this does not state the correct position.

On the one hand, this exclusion from the Relationships (Statutory References) Act 2005 is seen as entirely appropriate. Proposals such as the inclusion of same-sex couples within the Adoption Act constitute a significant shift in public policy, and should rightly be subject to substantive consideration in their own right. It would generally not be seen as appropriate to make such changes by way of consequential amendment through other legislation.

The cumulative effect of the above is that de facto couples (whether of the same or different sex) are not able to jointly adopt children. It is possible for one partner to adopt a child and for the other partner to obtain a legal

⁷⁷ Black v A-G (2000) 6 HRNZ 257.

⁷⁸ Crown Law Office opinion ATT114/1196(50);JUS043/530 (3 September 2004), in relation to a complaint to the Human Rights Commission: para.10.

⁷⁹ Brookers Online, (Eds), “Adoption by Same-Sex Partners”, in section PA2.6 of Child Law: Principles of Adoption, a Brookers Online publication of Family Law principles, <http://www.brookersonline.co.nz/databases/modus/family/childlaw/DISC-CHILD!41~GRP1.PA2?si=57359&sid=65i7lhb65ux2374bejjmdp3ohe2a3pgi&hli=0&sp=childlaw&p=4> (Retrieved: 8 May 2009).

relationship through guardianship but not for both partners to adopt jointly.

It has been accepted by the Ministry of Justice that the inability of same-sex couples to make a joint application for adoption constitutes *prima facie* discrimination.⁸⁰

The Ministry acknowledges that if the term "spouse" is interpreted ... to exclude de facto couples from jointly adopting a child, then this raises a prima facie issues of discrimination on the ground of marital status and indirect discrimination on the ground of sexual orientation.

The Crown Law Office also reported that the Ministry of Justice:⁸¹

... accepts that restricting people from being eligible to adopt solely on the basis of their relationship status does raise prima facie issues of discrimination under the Human Rights Act 1993 and s.19 BORA. In the Ministry's view the appropriate ground is marital status (section 21(1)(l)(iii) of the Human Rights Act)".

And, in relation to the requirement that joint adoptions be made only by spouses, the Crown Law Office said:⁸²

... what is clear is that the most current interpretation of the provisions is one that has an arguable discriminatory effect.

In light of these restrictions applying to de facto couples (different- and same sex) with regard to adoption, and in light of legislative prohibitions against discrimination on the ground of sex (gender), sexual orientation and marital status, it has also been stated that the fact that there is:⁸³

... an urgent need for statutory reform. ... The law is in an unsatisfactory state and the uncertainty places same-sex partners in a difficult position.

⁸⁰ Crown Law Office opinion ATT114/1196(50); JUS043/530 (3 September 2004), in relation to a complaint to the Human Rights Commission: para.21.

⁸¹ Crown Law Office opinion ATT114/1196(50); JUS043/530 (3 September 2004), in relation to a complaint to the Human Rights Commission, para.16.

⁸² Crown Law Office opinion ATT114/1196(50); JUS043/530 (3 September 2004), in relation to a complaint to the Human Rights Commission, para.15.

⁸³ Discriminatory Nature of Bar on Applications by Same-Sex Partners", section PA2.6.02 of Child Law: Principles of Adoption, an on-line publication of Family Law principles.

Options for reform

In its September 2000 Report, the Law Commission recommended that there should be no generic (arbitrary) restriction on the basis of sexual orientation, gender (sex) or marital status, in terms of who can apply to adopt a child. It was the view of the Commission that the important component of the process should be the assessment of the suitability of the applicant(s) based on the best interests of the child(ren).⁸⁴

The Law Commission accordingly posited that there are essentially two main considerations in relation to adoption law, these being eligibility and suitability. The Commission contended that there is no justifiable impediment to eligibility for adoption of children by de facto opposite-sex couples or by same-sex couples. The courts should be free to decide on the basis of the best interests of the child(ren) concerned, whether or not the particular applicant parents for adoption of a child are seen to be suitable prospective parents. The sexual orientation of a prospective parent should not be considered an issue of suitability.

Subsequently, the Government Administration Select Committee held an inquiry into adoption laws. The Committee, however, was unable to reach a decision on which direction adoption law in New Zealand should take. The Committee tabled its 1½-page Report in Parliament, stating:⁸⁵

While the committee conducted this inquiry into New Zealand's adoption laws, and spent time considering the issues raised by submitters, it is unable to provide the House with a substantive final report, which details the committee's considerations and conclusions.

It was hoped that further work would be undertaken with a view to reviewing the Adoption Act 1955 but, in September 2005, the Ministry of

⁸⁴ New Zealand Law Commission, "Adoption and Its Alternatives: A Different Approach and a New Framework", NZLC R65 (September 2000): paras.350-360.

⁸⁵ "Inquiry Into New Zealand's Adoption Laws", the Report of the Government Administration Committee (August 2001): 2.

Justice stated that, subsequent to the inclusive report of the Select Committee.⁸⁶

- an officials working group, led by the Ministry of Justice, was established to consider adoption law reform;
- to date, no Cabinet decisions have been made in relation to adoption laws;
- a review of the Adoption Act was not on the Ministry of Justice work programme for 2005/06; and
- no decisions had been made on whether a review of the Adoption act will be undertaken at any specific future time.

In the absence of any policy or legislative change, the onus therefore falls to same-sex couples who wish to see this matter progressed, to allocate their time and energy to the issue.

A recent development

On 5 November 2007, a judgment was issued, from the Family Court in Christchurch, relating to an application by a de facto (different-sex) couple seeking to adopt a child born as a result of in vitro fertilisation and surrogacy.⁸⁷ Both applicants were the biological parents of the baby.

Walsh J held that, in this case, the couple were permitted to adopt jointly as spouses.

He based this decision on the fact that the term 'spouse' is not expressly defined in the Act, and that the definition of the term 'spouse' had not been expressly settled upon by the courts:

- From about 1993, it was judicially accepted that the term 'spouse' was not defined in the Adoption Act 1955 and that, on the basis that such a definition was not expressly excluded, 'spouse' could mean a de facto partner.⁸⁸

⁸⁶ Letter from Ministry of Justice to Nigel Christie (21 September 2005).

⁸⁷ In the matter of C [Adoption] [2008] NZFLR 141(Judge Walsh).

⁸⁸ Adoption by Paul and Hauraki [1993] NZFLR 266 (Judge Boshier); Re T W [Adoption]

- Conversely, in a judgment issued on 24 November Judge Inglis held that, in s.7(2)(b) of the Act, the term ‘spouse’ can only mean a husband or wife in a marriage stating.⁸⁹

The matter has never been considered on appeal to the High Court, and Judge Walsh therefore considered that:⁹⁰

The situation therefore is that the authorities are divided as to whether ‘spouse’ in the Adoption Act 1955, includes couples living in a relationship in the nature of marriage or is limited to married couples.

Judge Walsh also considered:

- the fact that the Adoption Act 1955 is outdated;⁹¹
- calls for reform from the Law Commission, in particular;⁹² and
- the effect of human rights laws.⁹³

In the final analysis, Judge Walsh held that the de facto couple in this case were permitted to adopt jointly as ‘spouses’. He did, however, point out that the circumstances of this case were unique in that, while there had been a surrogacy arrangement, the couple seeking to adopt the child were both the child’s genetic parents.

It should be noted that this case was not been appealed.⁹⁴ This case does open the possibility of joint applications for adoption being filed by de

(1998) 17 FRNZ 349 (Judge von Dadelszen).

⁸⁹ In the matter of R [Adoption] [1998] NZFLR 145: 149: “The persons whose consents to any such order in respect of any child are required as aforesaid, unless they are dispensed with by the Court under section 8 of this Act, shall be ... [t]he spouse of the applicant in any case where the application is made by either a husband or a wife alone”.

⁹⁰ In the matter of C [Adoption] [2008] NZFLR 141(Judge Walsh): 146.

⁹¹ Judge Walsh cites the fact that “since 1979 there have been at least six reviews of adoption laws” but none of these have resulted in significant reform: In the matter of C [Adoption] [2008] NZFLR 141(Judge Walsh): 149.

⁹² Law Commission, “Adoption And Its Alternatives: A Different Approach And A New Framework”, NZLC R65 (September 2000): Through points made by the Law Commission, in particular, Judge Walsh suggests that the Act does not respond to current requirements of different family types and matters such as artificial birth technology

⁹³ Referring to the Human Rights Act 1993, the New Zealand Bill of Rights Act 1990 and the United Nations Convention on the Rights of the Child to support his view that the Adoption Act 1955 can, and should, be interpreted to include de facto couples as spouses.

⁹⁴ The time period within which an appeal must be lodged is now well passed.

facto couples – whether different- or same-sex. The issue then would become whether or not the agreement of the court rests on a generally inclusive interpretation of the term ‘spouse’ in the Adoption Act 1955, or whether the court would require a ‘special circumstance’,⁹⁵ to exist before allowing such an interpretation. A matter yet to be tested.

Civil Unions and Statutory References

A Civil Union Bill

In late 2000, Tim Barnett, a Member of Parliament for the governing Labour Party, formed a committee to consider a proposal for the recognition of same-sex relationships. I was a member of what was to become known as the ‘Civil Union Bill’ or CUB Committee.

Initially, the Committee considered the possibility of progressing in tandem, a proposal for legislation to provide for civil unions, and a proposal to provide for amendment to the Marriage Act 1955 to include same-sex couples.

As the work of the Committee progressed, however, any intention to amend the Marriage Act faded, and the focus of attention became the drafting of a Civil Union Bill.

In April 2001, I formally resigned from the CUB Committee, stating to the Committee:⁹⁶

If there is a place for civil union legislation for same-sex and different-sex couples, it can only be as an additional alternative to marriage (the exercise of choice being with the couples themselves). I do not believe that civil unions should be introduced with the cost of denying equality under the law for same-sex couples (entitlement and status) – and perhaps even at the risk of cementing inequality under the law for same-sex couples (entitlement and status). ... I continue to have a great deal of difficulty in working towards a regime which would continue to tell me, my partner, and other

⁹⁵ Such as the genetic parentage in In the matter of C considered by Judge Walsh, or cultural imperatives as considered by Judge Boshier in Adoption by Paul and Hauraki.

⁹⁶ Letter of resignation from Nigel Christie to the CUB Committee (11 April 2001).

persons with whom I interact on a daily basis, that my relationship and those of other same-sex couples are not as valid as those of different-sex couples.

For this reason, I wish to ... withdraw from further participation in the work towards a Civil Union Bill in New Zealand.

Tim Barnett MP, however, remained adamant that the work being undertaken towards civil unions was not indicative of a lack of his, or the Labour Government's support for same-sex marriage. Civil unions were on the agenda of the Labour party in the shorter term because they were 'politically' achievable. However, in early 2005, Mr Barnett wrote a column for a gay news magazine and expressed what seems to be a clear view that the achievement of civil unions would mean the essential attainment of equality:⁹⁷

What will be left to do?

Accepting that the aim is equal rights, what will be left after the second bill goes through are a series of laws which are currently being reformed (or on which reviews are being undertaken). They include guardianship (in the Care of Children Bill, which should be law by the end of this year); adoption (a bill is being worked on) and some minor areas. Most should be dealt with for good by General Election 2005. The only other matter which might lead to law change is that of hate speech / vilification, which is being looked at by the Ministry of Justice following real uncertainty about what the current law was intended to do, and how it should best be enforced.

After all that comes, in a sense, the harder job, making sure that Government agencies and others in society do their duty in delivering on the promises in our laws. That is the task of a lifetime. We all have a role in that.

I now want to throw a question back to you. What will you answer when a friend asks you in a few years time:

"And what did you do in the fight for equal rights – the Civil Union Bill?"

⁹⁷ "Big Events In Parliament", Tim Barnett, *Out!*, Issue 181 (June-July 2004). Note that, although Mr Barnett reports that an Adoption Amendment Bill was being worked on, this work did not lead to any legislative amendment.

I want you to be able to say:

"I did my bit. I wrote to my MP and I helped out with the campaign".

This is an historic campaign and the struggle will be hard. Keen to do your bit?

In 2004, the Government introduced to the House, its Civil Union Bill. The Bill provided for the legal status of civil union (or registered partnerships) and it was intended to provide the same, or as equal as possible to the same, legal entitlements that marriage provides.

Apart from the substantive issues raised and discussed at length previously, the lead up to and debate on the Civil Union Bill raised some additional specific process concerns for me.

First, I have stated previously that I believe the publicity for the Civil Union Bill was misleading. I must say, it was very clever of the advocates of the Bill to garner support by persuading sufficient numbers of gays and lesbians (in particular) that the legislation would provide them with equality with those who marry while also persuading sufficient numbers of potential detractors that marriage would remain untouched. The Civil Union Committee stated in its supporting material that:⁹⁸

The starting point and fundamental framework for the proposed Civil Union Bill is the principle of equal treatment as expressed by Justice Thomas in the Court of Appeal decision on same-sex marriage.

However, the bottom line is that the Civil Union Act 2004 (coupled with the Relationships (Statutory References) Act 2005) does not provide same-sex couples or other couples who enter into a civil union, with the same legal entitlements or the same status as those who marry. Civil unions are therefore not equal to marriage.

Second, it was stated that there was insufficient demand (in fact it was said that there was no demand) amongst gays and lesbians for same-sex marriage, but that many gays and lesbians preferred the option of civil unions. Leaving aside the vexed issue of whether or not it is possible to

⁹⁸ Information prepared by Civil Union Committee, April 2001.

choose not to marry if marriage is not a choice,⁹⁹ it is simply neither correct nor appropriate to state that there is insufficient demand for marriage. To suggest this is:

- to fail to recognise that compliance with human rights standards is not a matter of numbers – the very purpose of human rights is to protect minorities from discrimination regardless of influence;
- to fail to recognise that this is not an ‘either / or’ situation – human rights principles dictate that a preference by some for civil unions does not mandate registration over marriage but rather that whatever forms of legal recognition is available for different-sex couples must also be available for same-sex couples; and
- to ignore those of the gay and lesbian community who have presented themselves in our courts to seek access to marriage, and who have provided funding for various projects related to the same-sex marriage issue.

Third, there has been no comprehensive survey undertaken in New Zealand to establish the numbers of gays and lesbians who would prefer to register their relationships by way of civil unions rather than to marry.

The Civil Union Committee (an ad hoc consultative committee working with an individual Member of Parliament) conducted its own “survey”. This survey was, I would suggest, far from robust. Publicity on the Civil Union web-page indicated that the Committee had received 75 group responses, representing over 2,200 people. In order to attain this level of support, they drew the assumption that where a group indicated its agreement to the notion of civil unions in preference to marriage, 100% of the members of each group had agreed. This is an unreasonable assumption to make.

It was also stated that: “Despite problems in how people answered the ‘ranking’ question, we recorded a 57% preference for civil unions before

⁹⁹ See earlier discussion in Chapter 3.

same-sex marriage”.¹⁰⁰ However, there is no indication about what the problems were in relation to the ranking question, or how those problems might have affected the outcome.

I am aware that the Civil Union Committee provided information about their proposal for civil unions for participants to read, and that this information presented civil unions as New Zealand’s preferred model. The participants were invited to read the information and complete the survey. I would suggest that on this basis alone the responses would therefore be skewed – even if the information were 100% accurate. On the basis that I believe the information is misleading, at least to the degree that it sells the Civil Union Bill on the false premise of “equality”, then I would suggest that the response was even more skewed.

The processes employed to bring the Civil Union Act to fruition exemplify the fact that the principles being applied to the issue of relationships recognition for same-sex couples were those of political pragmatism rather than the dignity of the person and an adherence to well-articulated principles.

It also supports the comment made in its Report of 2001 by the Team that carried out the review of human rights in New Zealand, that New Zealand's human rights obligations, and in particular the relationship between the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993, are not well understood by the public, politicians or many government departments.¹⁰¹

Finally, it is always disappointing to listen to the response of Members of Parliament to issues such as the legal recognition of same-sex relationships. As gay and lesbian couples, it is difficult to reconcile our day-to-day lives with the comments contained within the records of the House. In respect of the recognition of same-sex relationships, the key themes seem to hover around same-sex couples seeking special rights, same-sex couples seeking to access something that is inherently

¹⁰⁰ E-Mail from CUB Committee Member (14 August 2001).

¹⁰¹ "Discussion Paper: Re-Evaluation Of The Human Rights Protections In New Zealand", a Paper prepared by the Ministerial Re-Evaluation Team for the Associate Minister of Justice (October 2000): 94-106; see also, comment earlier in this chapter.

heterosexual, same-sex couples seeking to upset a traditional cornerstone of society, and the despoliation of marriage.

Civil unions

While this section is essentially about anomalies that arise jurisdictionally in relation to marriage, I consider it worthwhile to mention some further anomalies that arise between the marriage and civil union.

First, when civil unions were introduced in New Zealand, as a measure of (purported) compliance with our domestic human rights imperatives, civil unions were made available to same-sex couples and to different-sex couples. It was stated at the time, that to create civil unions for same-sex couples only, would have been discriminatory.¹⁰²

If this is the case, the obvious question is ‘why is it not discriminatory, therefore, to not make marriage available to same-sex couples?’ The only answers given to date rely on the 1955 definition of marriage and the intent of the Marriage Act at that time, and religious sensitivities. Arguably, there has been no truly objective justification provided – but that issue is explored throughout this thesis.

Another issue is that, different-sex couples have a choice of relationship types – de facto, civil union, or marriage. This same range of choices is not extended to same-sex couples who have the choice only of de facto or civil union – marriage not included. One of the indicators of true equality is having true choice about the preferred form of relationship status.¹⁰³

What is more concerning is that the introduction of civil unions into New Zealand has, arguably, introduced new instances of discrimination into New Zealand law. For example, different-sex couples who are married and wish to convert their marriage to a civil union may do so; different-sex couples who enter into a civil union and wish to convert that civil

¹⁰² Draft “Proposal for the Legal Recognition of Same-Sex Couples in New Zealand”, March 2001, prepared by the Civil Union Committee chaired by Tim Barnett MP.

¹⁰³ See brief discussion on ‘freedom of choice’ above.

union to a marriage may do so. These choices are denied same-sex couples because same-sex couples are unable to marry.

When New Zealand Bills are scrutinised for Bill of Rights compliance, this is tested ‘internally’.¹⁰⁴ In the case of the Civil Union Act 2004, there may well have been provisions within the draft legislation that provided for different treatment but were not considered discriminatory ‘under New Zealand law’ because they had effect outside of the New Zealand domestic jurisdiction.

- New Zealand recognises registered partnerships from five overseas jurisdictions as civil unions in New Zealand.¹⁰⁵ However, the list is very limited. For example, New Zealand does recognise registered partnerships of Finland, but not those of Denmark or Belgium; and does recognise a *Lebenpartnerschaft* (life partnership) of Germany, but not a *Pacte Civil de Solidarité* (civil solidarity pact) of France.
- Furthermore, while New Zealand recognises the civil partnerships of the United Kingdom, the United Kingdom does not recognise civil unions from New Zealand.¹⁰⁶
- In some jurisdictions, a same-sex marriage from one country is recognised as a registered partnership in another country. Based on the premise (and what is becoming a more widely agreed principle)¹⁰⁷ that registered partnerships provide a lesser status than marriage, this is a legislated reduction in the status of that relationship.
- There is a general principle which assists in the interaction and recognition of laws across jurisdictional boundaries. The principle of comity of nations (courtesy between nations that obligates their

¹⁰⁴ That is, because New Zealand legislation applies only within the New Zealand jurisdiction, it cannot be considered in terms of Bill of Rights compliance is tested in the New Zealand context only, as the law is intended to app

¹⁰⁵ Civil Unions (Recognised Overseas Relationships) Regulations 2005 cl.3: see discussion above also.

¹⁰⁶ See earlier discussion on this, and other relationships expressly recognised by New Zealand, in Chapter 3.

¹⁰⁷ See for example, the discussion on the Advisory Opinion of the Supreme Judicial Court of Massachusetts to the legislature in which it rejects civil unions as being effective in providing equality with marriage.

mutual recognition of each other's laws)¹⁰⁸ constitutes a set of conventions whereby one country recognises the laws of another. With regard to marriage, the comity rules are particularly strong with high levels of acceptance in New Zealand of the validity of marriages solemnised in overseas jurisdictions.

Relationships (Statutory References) Bill 2005

Substantively, the Relationships (Statutory References) Act 2005, is much more beneficial to same-sex couples (and de facto different-sex couples) than the Civil Union Act 2004.

Entering into a civil union is a matter of formality – the formality of registration. It is the Statutory References Act that provides couples with access to the legal incidents that flow from that act of registration.

In some instances these entitlements are substantively significant.¹⁰⁹ In other instances they are relatively insignificant.¹¹⁰ It must be realised, of course, that even seemingly insignificant provisions can be extremely significant to particular individuals and particular times.

What is disappointing about the Statutory References Act is that, in similar fashion to the Civil Union Act, the impression was given that,

¹⁰⁸ “The body of rules developed in international law by which the courts of a state demonstrate respect for the rules, customs, and laws of another state. Non-observance of comity does not give rise to strict legal consequences; however, the state affected by the non-observance may reciprocate by retracting its own courteous practices. A doctrine of comity was developed by Ulricus Huber, and Paulus and Johannes Voet, stating that a host state, while retaining sovereignty, could accord the laws of another state validity within its territory out of respect for the other state”: in: Nygh, Hon Dr Peter E., and Butt, Peter, Australian Legal Dictionary, Butterworths, Canberra (1997): 212.

¹⁰⁹ For example: the Burial and Cremation Act 1964 and the Human Tissues Act 1964, enabling a civil union partner a decision-making role in relation to the disposal of the body or body parts of a deceased partner; the Crimes Act 1961, in relation to immunity for a civil union partner from being charged as an accessory after the fact, etc.

¹¹⁰ For example: Construction Contracts Act 2002, in relation to a person being an associate to a party to a contract – not issues that the average person is likely to come in contact with very often, if at all.

with the express exception of a couple of pieces of legislation,¹¹¹ same-sex couples would gain access to all the same legal entitlements as different-sex couples. Unfortunately, this is not the case.

OVERSEAS

Canada

British Columbia (Part 2)

On 23 July 2001, eight couples took their challenge for same-sex marriage to the Supreme Court of British Columbia. The couples were joined by EGALE, the Canadian federal lesbian, gay, bisexual and transgender equality-rights organisation.

Although some of the couples had been refused marriage licences by the British Columbia Director of Vital Statistics, the British Columbia provincial Government had issued a written statement expressing its support for same-sex marriage, and called upon the federal Government to enact laws explicitly permitting same-sex couples to marry.

Ontario (Part 2)

With the reading of the banns having taken place for three successive weeks in the Metropolitan Community Church in Toronto,¹¹² the marriage ceremonies of Kevin Bourassa and Joe Varnell, and Elaine and Anne Vautour, took place in the Church on 14 January 2001.¹¹³

¹¹¹ It was made clear that same-sex couples would not be able to get married, and therefore would not be able to convert civil unions to marriage. It was also common knowledge that the legislative rules relating to adoption of children would not change by virtue of the Civil Union Act or the Relationships (Statutory References) Act.

¹¹² See earlier discussion in Chapter 7.

¹¹³ These marriages were eventually to be confirmed as the world's first (modern) legally-valid same-sex marriages.

However, the Ontario Government refused to recognise the validity of the marriage:¹¹⁴

Ontario Unable to Register Same-Sex Marriages

“Whether the marriage is solemnized following the issuance of a licence or the publication of banns, it must comply with all applicable provincial and federal laws governing marriage in this province,” said Robert Runciman, Minister of Consumer and Commercial Relations, responding to news media questions about same-sex marriage in Ontario.

In order to be legally married, following either the publication of banns or the issuance of a marriage licence, a couple must have the legal capacity to marry. The capacity to marry is a matter within the exclusive jurisdiction of the federal government. The federal common law as confirmed by recent federal legislation defines marriage as the voluntary union for life of one man and one woman, to the exclusion of all others. Provincial law cannot alter the federal common law or confer capacity to marry.

In mid-2000, seven couples had applied for marriage licences from the City of Toronto.¹¹⁵ Their applications had been refused.

On 5 November 2001, the seven couples,¹¹⁶ the Metropolitan Church of Toronto,¹¹⁷ EGALE Canada Inc,¹¹⁸ and others,¹¹⁹ filed in the Ontario Superior Court of Justice seeking to have all marriages validated in law.

In essence, the couples argued that:

- marriage was being interpreted incorrectly by a restrictive adherence to common-law and tradition thereby not allowing for the definition to change with the times;

¹¹⁴ Press Release issued by the Ontario Ministry of Consumer and Business Services on 15 January 2001, the day after Kevin Bourassa and Joe Varnell sought to register their marriage.

¹¹⁵ See earlier discussion in Chapter 7 on this point also.

¹¹⁶ Hedy Halpern and Colleen Rogers, Michael Leshner and Michael Stark, Aloysius Pittman and Thomas Allworth, Dawn Onishenko and Julie Erbland, Carolyn Rowe and Carolyn Moffatt, Barbara McDowall and Gail Donnelly, and Alison Kemper and Joyce Barnett.

¹¹⁷ On behalf of Kevin Bourassa and Joe Varnell, and Elaine and Anne Vautour who had married in accordance with the practices of the Church.

¹¹⁸ EGALE Canada is “a national organization that advances equality and justice for lesbian, gay, bisexual, and trans-identified people and their families across Canada”, <http://www.egale.ca/> (Retrieved: 14 August 2009).

¹¹⁹ The Interfaith Coalition On Marriage And Family, the Association for Marriage and the Family in Ontario, the Canadian Coalition of Liberal Rabbis for Same-Sex Marriage, and the Canadian Human Rights Commission.

- such interpretations are unconstitutional and should be changed;
- the consequences of not permitting same-sex couples to marry are severe; and
- the restriction against access to marriage for same-sex couples should be removed and the issuance of marriage licences to same-sex couples should be ordered.¹²⁰

On 12 July 2002, the judgment of the trial Court was issued, and Blair RSJ, in what has come to be viewed as the majority decision of the Court, stated:¹²¹

- (a) *I declare the common law defining marriage as “the lawful and voluntary union of one man and one woman to the exclusion of all others” to be constitutionally invalid and inoperative.*
- (b) *I suspend the operation of the foregoing declaration for a period of 24 months to enable Parliament (and, where applicable, the Legislatures) to bring the law respecting marriage into line with the requirements of the Constitution Act 1982 and the Canadian Charter of Rights and Freedoms contained therein.*
- (c) *But, should Parliament (and, where applicable, the Legislatures) not act accordingly prior to the expiration of 24 months, I declare in that event that the common law of marriage – that is, “the lawful and voluntary union of one man and one woman to the exclusion of all others” – is to be reformulated by replacing the words “one man and one woman” with the words “two persons”.*

In addition, the Court stated that:¹²²

The problem must be addressed and resolved, however, and this must be done in a manner that accords to same-sex couples a recognition that is full and equal to that enjoyed by opposite-sex couples.

¹²⁰ Submissions of the Appellants, “Toronto Equal Marriage Challenge Legal Backgrounder”, EGale, http://www.egale.ca/documents/TO_Backgropunder.htm (Retrieved: 14 January 2002).

¹²¹ *Halpern v Canada* (2002) 60 O.R. (3d) 321: File No 684/00 (First Action) and 39/2001 (Second Action)); Judgment of Blair RSJ, para.145.

¹²² *Halpern v Canada* (2002) 60 O.R. (3d) 321: File No 684/00 (First Action) and 39/2001 (Second Action)); Judgment of Blair RSJ, para.138.

The Court also provided comment on whether or not a “separate but equal” regime would suffice, and indicated that:¹²³

equality of benefits and protection are not necessarily the same things as full and equal recognition.

On 29 July 2002, the federal Government announced its decision to appeal the Ontario decision. However, the Appeal Court found that:¹²⁴

- 1) *the existing common law definition of marriage is “the voluntary union for life of one man and one woman to the exclusion of all others”;*
- 2) *the courts have jurisdiction to alter the common law definition of marriage; resort to constitutional amendment procedures is not required;*
- 3) *the existing common law definition of marriage does not infringe MCCT’s freedom of religion rights under s.2(a) of the Charter or its equality rights on the basis of religion under s.15(1) of the Charter;*
- 4) *the existing common law definition of marriage violates the Couples’ equality rights on the basis of sexual orientation under s.15(1) of the Charter;*
- 5) *the violation of the Couple’s equality rights under s.15(1) of the Charter cannot be justified in a free and democratic society under s.1 of the Charter.*

In response to their findings, and as a remedy to the violation of the rights, on 10 June 2003 the Court:¹²⁵

- 1) *declared the existing common law definition of marriage to be invalid to the extent that it refers to “one man and one woman”;*
- 2) *reformulated the common law definition of marriage as “the voluntary union for life of two persons to the exclusion of all others”,*
- 3) *ordered the declaration of invalidity in (1) and the reformulated definition in (2) to have immediate effect;*

¹²³ *Halpern v Canada* (2002) 60 O.R. (3d) 321: File No 684/00 (First Action) and 39/2001 (Second Action)); Judgment of Blair RSJ, para.130.

¹²⁴ *Halpern v Canada* (2003), 65 O.R. (3d) 161: para.155.

¹²⁵ *Halpern v Canada* (2003), 65 O.R. (3d) 161: para.156.

- 4) *ordered the Clerk of the City of Toronto to issue marriage licenses to the Couples; and*
- 5) *ordered the Registrar General of the Province of Ontario to accept for registration the marriage certificates of Kevin Bourassa and Joe Varnell and of Elaine and Anne Vautour.*

In effect, the Court had held that same-sex couples in Canada have a constitutional right to marriage under existing marriage law, and that that right should be given immediate effect. The Court also affirmed that providing access to marriage for same-sex couples does not limit religious freedom.¹²⁶

In reaching these conclusions, the Court had confirmed that same-sex marriage in Canada was a reality. Attention now turned to the consideration of which other provinces, if any, would follow Ontario's example and provide access to marriage for same-sex couples?

The Court had seen fit to link its decision with the trial Court decision in Ontario. But, on 10 June 2003, soon after the release of this decision, the Court of Appeals in Ontario effectively removed the time bar on its decision.

The province of Ontario became the first provincial jurisdiction in Canada to allow access to equal marriage for same-sex couples.

British Columbia (Part 3)

The Court's decision in Barbeau, based on the definitional argument, was appealed to the British Columbia Court of Appeal which, on 1 May 2003, released a unanimous decision reversing the Supreme Court decision.

This was to be the first decision on the issue of same-sex marriage to be issued by a provincial Court of Appeal. Its significance could not be

¹²⁶ Halpern v Canada (2003), 65 O.R. (3d) 161: para.138.

underestimated. In providing the judgment of the Court, Prowse J stated that the Court would:¹²⁷

- (a) *grant a declaration pursuant to s.52 of the Constitution Act 1867 that the common law bar against same-sex marriage is of no force or effect because it violates rights and freedoms guaranteed by s.15 of the Charter and does not constitute a reasonable and demonstrably justified limit on those rights and freedoms within the meaning of s.1 of the Charter;*
- (b) *reformulate the common law definition of marriage to mean “the lawful union of two persons to the exclusion of all others”; and*
- (c) *suspend the relief ... until July 12, 2004, solely to give the federal and provincial government time to review and revise legislation to bring it into accord with this decision.*

Subsequently, at the request of the litigant couples, on 8 July 2003, the British Columbia Court of Appeal followed the lead of Ontario and ordered the Province of British Columbia to immediately begin issuing marriage licences to same-sex couples.¹²⁸

British Columbia became the second Canadian province to provide equal access to marriage for same-sex couples.

Quebec

On 8 – 15 November 2001, a challenge to Quebec’s marriage statutes have been heard by the Superior Court of the District of Montreal in the Province of Quebec.¹²⁹ The Quebec Civil Code restricted marriage to different-sex couples and the petitioners, Michael Hendricks and Rene Leboeuf were joined by the Quebec Coalition for Same-Sex Relationship

¹²⁷ *Barbeau et al v Canada (Attorney-General) et al* 2003 BCCA 251: Prowse J, paras.158-161.

¹²⁸ EGALE, “Same-Sex Marriage Now Legal In BC!”, *EGALE*, Press Release, Canada (08 July 2003).

¹²⁹ Quebec had already passed legislation which provided partnership registration.

Recognition (an Intervenor), in arguing that the denial of marriage to same-sex couples was:¹³⁰

- a denial of their “equal dignity and respect”;
- a denial of equal recognition of conjugal status;
- a denial of their right to full citizenship; and
- a denial to children of same-sex families of the rights enjoyed by children in different-sex families.

The arguments were based on the Canadian Charter of Rights and Freedoms, the Quebec Provincial Charter and the Universal Declaration of Human Rights. It was argued that the exclusion of same-sex couples from marriage has resulted not from the “institution” of marriage itself, but rather from the recent laws of a secular state.¹³¹

The Court issued its decision on 6 September 2002. In a manner similar to the previous decisions of the trial courts in Ontario and British Columbia, the Quebec Court of Appeal lifted the time-bar that had been imposed by the Quebec Superior Court.¹³² Quebec suddenly became the third province in Canada to allow same-sex couples to marry.

United States Of America

Vermont (Part 3)

In 1999, the Supreme Court of Vermont had held that same-sex couples did not have equal access to marriage in the State of Vermont. At the same time, the Court did state that there was “a constitutional obligation to extend to plaintiffs the common benefit, protection, and security that

¹³⁰ “First Step In Struggle For State Recognition Of Same- Sex Couples’ Right To Civil Marriage”, Quebec Coalition for Same-Sex Relationship Recognition, Press Release (02-Oct-2001).

¹³¹ Hendricks & Leboeuf v Attorney-General of Quebec & Attorney-General of Canada et al (Superior Court, Montreal, Quebec, N.500-05-059656-007 (08-15 November 2001)); Petitioner’s Plan of Argument: para.17.

¹³² EGALE, “Quebec Becomes Third Province To Allow Same-Sex Couples To Marry”, EGALE, Press Release, Canada (19 March 2004).

Vermont law provides opposite-sex married couples” and that it was up to the legislature “to determine the appropriate means and scope of relief compelled by this constitutional mandate”.¹³³

The Vermont Legislature responded by enacting new legislation, which came into effect on 1 September 2000 making made civil unions available to same-sex couples. With this, Vermont became the first state in the United States of America to enable same-sex couples “to acquire a legal status with all the consequences incidental to marriage”.¹³⁴

Further court challenges followed. Pro-marriage lobbyists argued that civil union legislation did not respond adequately to the Court’s directive in that civil unions, by their very definition, cannot give the same incidents of marriage in all respects.¹³⁵

Conservatives challenged the validity of the civil unions legislation forecasting the breakdown of marriage and the family and arguing that the Court had gone to far. These challenges were rejected and in early 2002, same-sex couples in Vermont were able to register their partnerships by way of civil unions but not marriage. Once again, the Legislature had to find a means of avoiding extending marriage to same-sex couples. The couples had won a technical victory only.

After the passing of legislation for civil unions in Vermont, a group calling themselves “Take Back Vermont” emerged and almost upended Vermont’s politics during the 2000 elections. They forged an unsuccessful campaign to block Governor Dean’s return as Governor of the state – in the hope that a new Governor would initiate a repeal of the civil union legislation.

Subsequently, another lobby group, “Take It To The People (TIP)” led a campaign to have civil union legislation repealed and replaced with a reciprocal partnerships Bill. Such a Bill would have offered limited

¹³³ Baker v Vermont Supreme Court of Vermont, Docket No. 98-032 (1999) (no paragraph or page numbers).

¹³⁴ Donald G. Casswell, “Moving Towards Same-Sex Marriage”, in [2001] 80 La Revue du Barreau Canadien 810: 841.

¹³⁵ For example, marriages solemnised in one state are recognised in all other states – civil unions are recognised only in Vermont.

financial protections to a range of sexual and non-sexual relationships, but would not confer on them a “quasi marital status”.

Also, a group of taxpayers, legislators and town clerks filed an application in Vermont’s Supreme Court challenging the civil union legislation, stating that:

- it was invalid because 14 House members who supported the legislation had bet on the outcome of a preliminary House vote; and
- it was unconstitutional because it forced town clerks to violate their religious beliefs that homosexuality is wrong by issuing civil union licences to couples.

The Court rejected the challenges stating that the matter of the bet on voting was a matter for the House, and that, in relation to the constitutional rights of the clerks, a person could retain a public office while refusing to perform a generally applicable duty of that office, besides which, the law accommodates the clerks’ personal concerns by explicitly permitting them to appoint an assistant to issue the licences.¹³⁶

Massachusetts (Part 1)

In 2003, the Supreme Judicial Court of Massachusetts considered the marriage case Goodridge & others v Department of Public Health & another.¹³⁷ It was to be this case that would result in Massachusetts being the first State in the United States of America to provide equal access to marriage for same-sex couples.

The Supreme Judicial Court of Massachusetts considered that its role was not only to interpret statutes to carry out the legislature’s intent, but also to protect the rights guaranteed to citizens under the Constitution.

¹³⁶ “Vermont Rejects Civil Unions Challenge”, Associated Press (3 January 2002).

¹³⁷ Goodridge & Others v Department of Public Health & Another 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003).

The Court established that the definition of marriage in Massachusetts (as in New Zealand) has been derived from common law. The common law definition must stand unless either the legislature has demonstrated an alternative intent by way of express statutory provision, or the definition is in conflict with (in this case) the State Constitution. That is, there would need to be a balancing of the “ordinary and approved” meaning of the term marriage with the need to protect the constitutional rights of citizens.¹³⁸

The Court also considered the nature of marriage and concluded that civil marriage is “a wholly secular institution”,¹³⁹ created by Government, regulated by statute, and that there has never been a requirement that a marriage be validated by a religious ceremony. The Court described marriage as a “social institution of the highest importance” which “without question ... enhances the ‘welfare of the community’ ... by encouraging stable relationships over transient ones”.¹⁴⁰

Key themes from Goodridge

The Court also considered the key arguments put forward by the State and by Amici to the Court for prohibiting same-sex couples from marriage. These are the equivalent of the “justifiable limitations” in the New Zealand situation”.

Procreation

The State argued that marriage provides a “favourable setting for procreation”.

¹³⁸ Goodridge & Others v Department of Public Health & Another 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 319.

¹³⁹ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 321.

¹⁴⁰ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 322.

The Court responded to this by saying that:¹⁴¹

Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. General Laws c.207 contains no requirement that applicants for a marriage licence attest to the ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce.

Childrearing

The State also argued that marriage ensures the optimal setting for child-rearing describing the optimal family as “a two-parent family with one parent of each sex”.

The Court responded to this by saying that:¹⁴²

Protecting the welfare of children is a paramount State policy. Restricting marriage to opposite-sex couples, however, cannot plausibly further this policy. ... The “best interests of the child” standard does not turn on a parent’s sexual orientation or marital status. ... [Same-sex] couples have children for the same reasons others do – to care for them, to nurture them. But the task of child rearing for same-sex couples is made infinitely harder by the status as outliers to the marriage laws. ... It cannot be rational under our laws, and indeed it is not permitted, to penalize children by depriving them of State benefits because the State disapproves of their parents’ sexual orientation.

Financial Resources

The State argued that marriage preserves scarce State and private financial resources.

¹⁴¹ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 333.

¹⁴² Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 333-336.

The Court responded to this by saying that:¹⁴³

an absolute statutory ban on same-sex marriage bears no rational relationship to the goal of [State] economy;

Destruction of marriage

Amici argued that broadening civil marriage to include same-sex couples will trivialise or destroy the institution of marriage as it has historically been fashioned.

The Court responded to this by saying that:¹⁴⁴

The plaintiffs seek only to be married, not to undermine the institution of civil marriage. They do not want to abolish marriage, they do not attack the binary nature of marriage, the consanguinity provisions, or any other gate-keeping provisions of the marriage licensing law. Recognizing the right of an individual to marry a person of the same sex will not diminish the validity or dignity of opposite-sex marriage ... If anything, extending civil marriage to same-sex couples reinforces the importance of marriage to individuals and communities.

That same-sex couples are willing to embrace marriage's solemn obligations of exclusivity, mutual support, and commitment to one another is a testament to the enduring place of marriage in our laws and in the human spirit.

Interstate conflict

Amici also argued that expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict.

¹⁴³ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 336.

¹⁴⁴ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 337.

The Court responded to this by saying that:¹⁴⁵

we would not presume to dictate how another State should respond to [our] decision, but neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution.

Summary

In summary, the Court rejected all arguments and in November 2003, Marshall CJ, wrote for the Supreme Judicial Court of Massachusetts, saying:¹⁴⁶

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under the law.

Although the Court had found that the restriction from marriage was unconstitutional, the Court, in a similar manner to the Courts in Canada, deferred to the Legislature for a period of 180 days (up to about 17 May 2004) the decision as to how the issue of marriage rights for same-sex couples should be dealt with.

Advisory Opinion of the Supreme Judicial Court of Massachusetts

The Senate of the Commonwealth of Massachusetts subsequently returned to the Supreme Judicial Court of Massachusetts with a

¹⁴⁵ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 340.

¹⁴⁶ Goodridge & Others v Department of Public Health & Another, 440 Mass. 309, 798 N.E.2d 941 (Supreme Judicial Court of Massachusetts: 4 March 2003 / 18 November 2003): 313.

reference for an advisory opinion in relation to a Civil Union Bill (Senate, No.2175) and asked the question:¹⁴⁷

Does Senate, No. 2175, which prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?

The response of the Court, on 3 February 2004, was:¹⁴⁸

The answer to the question is "No".

In support of this response, however, the Court did provide some interesting discussion:¹⁴⁹

Because the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status ... The history of our nation has demonstrated that separate is seldom, if ever, equal.

The bill's absolute prohibition of the use of the word "marriage" by "spouses" who are the same sex is more than semantic ... it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status ... no amount of tinkering with language will eradicate that stain.

But the question the Court considered in Goodridge was not only whether it was proper to withhold tangible benefits from same-sex couples, but also whether it was constitutional to create a separate class of citizens by status discrimination, and withhold from that class the right to participate in the institution of civil marriage, along with its concomitant tangible and intangible protections, benefits, rights, and responsibilities. Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage is the constitutional infirmity at issue.

¹⁴⁷ Massachusetts Supreme Judicial Court, "Opinions of the Justices to the Senate", SJC-09163 (3 February 2004): Introduction.

¹⁴⁸ Massachusetts Supreme Judicial Court, "Opinions of the Justices to the Senate", SJC-09163 (3 February 2004): Section 4, Conclusion.

¹⁴⁹ Massachusetts Supreme Judicial Court, "Opinions of the Justices to the Senate", SJC-09163 (3 February 2004): Section 3, Analysis.

The conclusion of the Court was that:¹⁵⁰

We are of the opinion that Senate 2175 violates the equal protection and due process requirements of the Constitution of the Commonwealth and the Massachusetts Declaration of Rights ... The Bill maintains an unconstitutional, inferior and discriminatory status for same-sex couples ...

As a result of the above, on 19 November 2003 the legislature of the State of Massachusetts passed legislation providing same-sex couples in that State with equal access to marriage. The law came into effect on 17 May 2004.

South Africa

Introduction

Post-apartheid South Africa was the first nation in the world to expressly and constitutionally protect against discrimination on the grounds of sexual orientation.¹⁵¹ This paved the way for a series of court cases relating to the rights of same-sex couples and eventually leading to a case in which same-sex couples sought access to civil-legal marriage.

Previous cases had been successful in securing for same-sex couples the same immigration rights as for married partners,¹⁵² the same financial benefits as for different-sex couples,¹⁵³ the right to adopt children,¹⁵⁴ and the same rights relating to the status of children born as a result of artificial birth technology as those born to different-sex couples.¹⁵⁵

¹⁵⁰ Supreme Judicial Court of Massachusetts, "Opinions of the Justices to the Senate", SJC-09163 (3 February 2004): Section 4, Conclusion.

¹⁵¹ See earlier discussion in previous chapter.

¹⁵² National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others (2 December 1999).

¹⁵³ Satchwell v President of the Republic of South Africa and Another (High Court: 25 July 2002); confirmed by Satchwell v President of the Republic of South Africa and Another (Constitutional Court: 17 March 2003).

¹⁵⁴ Du Toit and Another v Minister of Welfare and Population Development and Others (10 September 2002).

¹⁵⁵ J and B v Director General, Department of Home Affairs, and Others (28 March 2003).

The Fourie court case

On 17 May 2005, the joined cases of lesbian couple Marie Fourie and Cecelia Bonthuys, and the Lesbian and Gay Equality Project of South Africa and 18 others was heard by the Constitutional Court of South Africa. The Court hears cases under the Constitution of South Africa, and in this instance was specifically interested in section 9(1) which reads “Everyone is equal before the law and has the right to equal protection and benefit of the law”, and section 9(3) which reads “The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds including ... sexual orientation ...”.

In essence, the Court needed to answer the question: Does the fact that no provision is made for the applicants, and all those in like situation, to marry each other, amount to (a) denial of equal protection of the law, and (b) unfair discrimination by the state against them, because of their sexual orientation?

The Court stated that:¹⁵⁶

Equality means concern and respect across difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a leveling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgement and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the vitality that difference brings to any society.

The Court was to hold that it was unconstitutional to deny access to marriage by same-sex couples and that such access must be provided. In

¹⁵⁶ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.60.

conveying this decision the Court said:¹⁵⁷

... there can only be one answer to the question as to whether or not such couples are denied equal protection and subjected to unfair discrimination. Clearly, they are, and in no small degree. The effect has been wounding and the scars are evident in our society to this day.

If heterosexual couples have the option of deciding whether to marry or not, so should same-sex couples have the choice as to whether to seek to achieve a status and a set of entitlements and responsibilities on a par with those enjoyed by heterosexual couples. It follows that, given the centrality attributed to marriage and its consequences in our culture, to deny same-sex couples a choice in this respect is to negate their right to self-definition in a most profound way.

On 1 December 2005, South Africa became the fifth country in the world to extend civil-legal marriage to same-sex couples.

Key themes from Fourie

The Court considered four main arguments posited to it by the Government in support of the Government's proposition that whatever the decision to be reached by the Court it must acknowledge the need to leave traditional marriage intact. These arguments can be summarized as follows:

- 1) procreation;
- 2) the need to respect religion;
- 3) recognition given by international law to heterosexual marriage; and
- 4) the necessity to have recourse to diverse family law systems contained in section 15 of the Constitution.

The following sections outline the Court's response to each of the arguments posited by the Government of South Africa.

¹⁵⁷ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.78 and para.72.

Procreation

The Court was not convinced by the procreation argument stating that, from a legal and constitutional point of view, while procreation may be an indicator of the existence of a conjugal relationship is it not a defining characteristic. The Court further stated:¹⁵⁸

To hold otherwise would be deeply demeaning to couples (whether married or not) who, for whatever reason, are incapable of procreating when they commence such a relationship or become so at any time thereafter. It is likewise demeaning to couples who commence such a relationship at an age when they no longer have the desire for sexual relations or the capacity to conceive. It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children. It is even demeaning of a couple who voluntarily decide not to have children or sexual relationship with one another, this being a decision entirely within their protected sphere of freedom and privacy.

Respect for religion

The Court went to great lengths to emphasise the fact that what the couples were seeking in this instance was access to civil-legal marriage and not religious marriage. In the process of dealing with this issue, the Court made a series of very strong statements about the difference between the civil-legal aspects of this issue and the religious. The Court stressed that:

- in the open and democratic society contemplated by the Constitution there must be a respectful co-existence between the secular and the sacred – “the role of the Court is to recognise the sphere which each inhabits, not to force the one into the sphere of the other”;¹⁵⁹

¹⁵⁸ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.78 and para.86, citing Ackermann J in National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC): para.51.

¹⁵⁹ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South

- the couples were not seeking to upset the religious beliefs and views of any other persons;
- the Constitution requires that the religious views of other persons be respected, but that this includes being able to be free from the imposition of those other persons upon oneself (that is, the right to freedom of religion also includes the right to freedom from religion);
- no Minister of religion could be compelled to solemnize a marriage between same-sex partners if such a marriage would be contrary to the doctrines of the religion concerned;¹⁶⁰ and
- majoritarian opinion can often be harsh to minorities that exist outside the mainstream and cannot therefore prevail purely on the basis of its status as a majority view, because there must be no prejudice to basic rights.¹⁶¹

In conclusion on this issue, the Court said:¹⁶²

... acknowledgement by the state of the right of same-sex couples to enjoy the same status, entitlements and responsibilities of marriage law accords to heterosexual couples is in no way inconsistent with the rights of religious organisations to continue to refuse to celebrate same-sex marriages. The constitutional claims of same-sex couples can accordingly not be negated by invoking the rights of believers to have their religious freedom respected. The two sets of interests involved to not collide, they co-exist in a constitutional realm based on accommodation of diversity [and mutual respect (my addition)].

Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.93.

¹⁶⁰ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.97.

¹⁶¹ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.94.

¹⁶² Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.98.

International recognition

The Court dealt with this very briefly stating:¹⁶³

I conclude that while it is true that international law expressly protects heterosexual marriage it is not true that it does so in any way that necessarily excludes equal recognition being given now or in the future to the right of same-sex couples to enjoy the status, entitlements, and responsibilities accorded by marriage to heterosexual couples.

Family law pluralism

The State and the Amici relied on s.15(3) of the Constitution as a means of supporting their contention that the traditional definition of marriage must prevail.¹⁶⁴ The Court refuted this argument, suggesting instead that the provision established that:¹⁶⁵

... there is no hegemonic model of marriage inexorably and automatically applicable to all South Africans ... The section "does not prevent" legislation recognising marriages or systems of family or personal law established by religion or tradition. It is not peremptory or even directive, but permissive.

The Court also suggested that the diversity of marriage might be enhanced by the inclusion of same-sex couples and that it could certainly not be argued that inclusion of same-sex couples would devalue the institution of marriage.¹⁶⁶

The express or implied assertion that bringing same-sex couples under the umbrella of marriage law would taint those already within its protection can

¹⁶³ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.105.

¹⁶⁴ Section 15(3) states that: "This section does not prevent legislation recognising (i) marriages concluded under any tradition, or a system of religious, personal or family law; or (ii) systems of personal and family law under any tradition, or adhered to by persons professing a particular religion. ..."

¹⁶⁵ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.107 and para.108.

¹⁶⁶ Fourie & Bonthuys and Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Director-General of Home Affairs (Constitutional Court of South Africa, CCT 60/04 and CCT 10/05: 17 May 2005; 1 December 2005): para.113 and para.112.

only be based on a prejudgement, or prejudice against homosexuality. That is exactly what section 9 of the Constitution guards against. ... The ubiquity of a prejudice cannot support its legitimacy. ... Whatever its origin, objectively speaking this argument is in fact profoundly demeaning to same-sex couples, and inconsistent with the constitutional requirement that everyone be treated with equal concern and respect.

The Netherlands

On 1 April 2001, The Netherlands became the first country in the world to grant access for same-sex couples to marriage under existing marriage legislation on effectively the same terms as different-sex couples. As a result, the Netherlands was the only country to offer same-sex couples “equality under the law”.¹⁶⁷

Although the marriage legislation was debated for years, it seems that it eventually went through quite smoothly. The original Bill was passed by the Lower House of the Dutch Parliament on 12 September 2000, and subsequently by the Senate on 21 December 2000. Both Houses of the Dutch Parliament passed the Bill with overwhelming majorities, and only the religious parties opposed the final vote. The law came into effect on 1 April 2001.¹⁶⁸

At midnight the Mayor of Amsterdam officiated at the first full civil marriage in the Council Chamber of City Hall in Amsterdam. Eight men and women became (as of that time) the world’s first legally married gay and lesbian couples.¹⁶⁹ At the time of these first marriages “[a] handful of

¹⁶⁷ Note that registered partnerships have been available for both different-sex and same-sex couples since 1998.

¹⁶⁸ <http://hollandsouth.angloinfo.com/countries/holland/gaymarriage.asp> (Retrieved: 22 July 2009); http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (Retrieved: 14 August 2009); and, “Dutch Women Plan Same-Sex Wedding”, Associated Press (30 March 2001).

¹⁶⁹ “Amsterdam to Celebrate ‘Gay Marriage’”, [Gay.com UK](http://uk.gay.com/news/2790) (27 March 2001) (downloaded on 27 March 2001 from: <http://uk.gay.com/news/2790>). Note that Kevin Bourassa and Joe Varnell, and Elaine and Anne Vautour, of Toronto, Canada, subsequently became the world’s first legally married same-sex couples, by virtue of retrospective recognition of their marriage which took place on 14 January 2001.

demonstrators protested outside City Hall, calling the unions ‘unnatural’.¹⁷⁰

Access to marriage for same-sex couples was provided by amending the existing Dutch Marriage Act to provide that the legislation should apply to same-sex couples in the same way that it applies to different-sex couples. As a result, in relation to the contracting of a marriage, there is no difference in the treatment of same-sex couples who marry as compared with different-sex couples. Initially there were some restrictions for same-sex couples in relation to rights to adopt but, as of 1 January 2009, these restrictions were removed. Marriage for same-sex and different-sex couples is now conducted on precisely the same terms with precisely the same consequences.

The United Kingdom

On 10 January 2002, Lord Lester introduced, to the House of Lords, a Civil Partnerships Bill. The Bill was designed to provide for different-sex and same-sex couples, and included procedural provisions relating to registration and dissolution of the formal relationship, as well as a range of legal consequences. It proposed to recognise property rights (inheritance, pensions, bereavement-related damages), and to cater for health and welfare decision-making in relation to a partner without capacity to act. It did not provide for family-related issues such as adoption of children, access to artificial birth technology, or matters relating to guardianship and parenting.

As has been the case with registered partnership regimes generally, one of the selling points of the Bill was that:¹⁷¹

[i]t is not a threat to marriage; it is an alternative which allows couples who cannot, or would not, marry to base their common life on a firm legal foundation.

¹⁷⁰ “Dutch Law Allows Same-Sex Marriages”, Associated Press (31 March 2001).

¹⁷¹ “It Is Time That Unmarried Couples Were United In The Eyes Of The Law”, The Times, London (10 January 2002): article written by Lord Lester of Herne Hill, QC and Liberal Democrat peer, and who introduced the Bill to the House of Lords.

Lord Lester withdrew this Bill before it went forward for full consideration.

However, more recently, the Bill was revived and on 18 November 2004 it received Royal Assent after having been passed by the House of Commons and the House of Lords. It came into effect on 5 December 2005 and the first couples who so wished were able to register their partnerships from 20 December 2005 (after the statutory 15-day waiting period).

The legislation does not provide all the same entitlements, protections and obligations that flow from marriage, but does include:

- a duty to provide reasonable maintenance for a partner and any children of the family;
- assessment in the same way as spouses for child support;
- access to the protections relating to domestic violence;
- exemption from testifying against each other in court;
- next-of-kin rights
- equitable treatment for the purposes of life insurance;
- employment and pension benefits;
- recognition under intestacy rules;
- access to fatal accidents compensation;
- recognition for immigration and nationality purposes;
- exemption from inheritance tax on a partner's home; and
- formal, court-based process for dissolution of partnerships.

The legislation also provides for the recognition, as civil partnerships in the UK, of specified legally recognised overseas partnerships.¹⁷²

The Civil Partnership Act 2004 (UK) s.214 also allows for a couple to 'prove' that their relationship meets the general conditions for a Civil Partnership and thereby qualifies to be recognised as such in the United Kingdom.

What is particularly interesting, however, and in my view somewhat concerning, is that the United Kingdom legislation expressly recognises same-sex marriages of Belgium, Canada, The Netherlands, Massachusetts and Spain as civil partnerships in the United Kingdom, as would be same-sex marriages from those countries where same-sex marriage has become possible since 5 December 2005. Different-sex marriage from those countries are recognised in the United Kingdom as marriages. With regard to same-sex marriages, this constitutes a diminution of the status of those relationships, as compared with their status in their home country, and as compared with their status with different-sex couples who come to the United Kingdom in identical circumstances. The efficacy of this in human rights terms would seem somewhat questionable. Certainly, it raises issues with regard to recognising the inherent dignity of the persons affected.

Belgium

The drive for access to marriage for same-sex couples in Belgium was led by Holebifederatie, Belgium's largest gay and lesbian federation and the

¹⁷² See Civil Partnership Act 2004 (UK) Schedule 20. Overseas relationships recognised include as at 5 December 2005): Andorra (Stable Partnership Union); Tasmania, Australia (Significant Relationship); Belgium (Marriage and Statutory Cohabitation); Canada (Marriage); Nova Scotia, Canada (Domestic Partnerships); Quebec, Canada (Civil Unions); Denmark (Registered Partnerships); Finland (Registered Partnerships); France (Civil Solidarity Pacts); Germany (Life Partnerships); Iceland (Confirmed Cohabitation); Luxembourg (Registered Partnership); The Netherlands (Marriage and Registered Partnerships); New Zealand (Civil Unions); Norway (Registered Partnerships); Spain (Marriage); Sweden (Registered Partnerships); and in the USA, California (Domestic Partnership), Connecticut (Civil Union), Maine (Domestic Partnership), Massachusetts (Marriage), New Jersey (Domestic Partnership), Vermont (Civil Union).

campaign lasted for more than five years. Gay and lesbian groups did not want the recognition of same-sex relationships singled out into a separate law and for this reason much of the work was done directly with Parliamentary Representatives.

Success became a real possibility when the Social Christians, a conservative party with strong Catholic roots, lost the 1999 election after 40 years in power.

By the time the matter came to Parliament, only a handful of Social Christians voted against it. Philippe Verdonck, a civil law expert in the office of Belgium's Justice Minister said, "By then, it was not possible to say, 'I'm against it'. It had simply become politically incorrect to do so".

So, in January 2003, without holding public hearings, the coalition government of the Liberal, Socialist and Green parties amended the 1830 Civil Code to change the definition of marriage from a union between husband and wife, to one between spouses.

As for the rest of the country, what the gay and lesbian community sees as a major victory for equal rights caused little reaction after the initial flurry of media stories. Verdonck says that the lesson for countries that intend similar legislation is that the change is not nearly as revolutionary as some make it out to be: "You wake up the next morning and everyone realizes that nothing dramatic has happened".¹⁷³

On 1 June 2003, Belgium became the second country in the world to offer same-sex couples access to marriage under existing marriage legislation. The Bill was first approved by the Belgian Senate and then succeeded before the House of Representatives with a 91-22 vote (9 abstentions). As a result, the Belgian Civil Code was amended to provide that the legislation should apply to same-sex couples in the same way that it applies to different-sex couples, except with regard to rights of adoption and paternity. These differences were removed in 2005.¹⁷⁴

¹⁷³ Information in the previous few paragraphs from "June Weddings A First For Gays In Belgium: Couples Savour Their 'Perfect Day' - Event Causes Little Fuss Elsewhere", *Toronto Star* (23 June 2003).

¹⁷⁴ Partners task Force For Gay And Lesbian Couples, "Registered Partnerships: The

Spain

On 29 June 2005, Spain became the fourth jurisdiction in the world to offer marriage to same-sex couples subsequent to the Belgian legislation (remembering that Canada had achieved marriage for same-sex couples as a legislative consequence of Court cases).

Like The Netherlands and Belgium, the extension of marriage to same-sex couples in Spain occurred by opening up existing marriage law. In the Congress of Deputies prior to the vote on the legislation, Prime Minister Zapatero told the chamber:¹⁷⁵

... a small change in wording that means an immense change in the lives of thousands of citizens. We are not legislating, ladies and gentlemen, for remote unknown people. We are expanding opportunities for the happiness of our neighbours, our work colleagues, our friends, our relatives. Today Spanish society is giving an answer to a group of people who for years have been humiliated, whose rights have been ignored, whose dignity has been offended.

The legislation was passed by a 187-147 majority (4 abstentions) in the House of Congress, with the minority government receiving support from several small regional parties. The Senate (the Upper House) had rejected the Bill a week prior to the final vote, but the Senate is an advisory body only and so its vote had no binding effect on the House of Congress.

The amended Marriage Act enables same-sex couples to marry on the same terms as different-sex couples and attracts almost all the entitlements of marriage, including adoption rights.¹⁷⁶

What is somewhat remarkable about this legislation is that it proceeded relatively smoothly despite the fact that Spain is a strongly religious Roman Catholic country. The Catholic Church had launched a series of

Scandinavian Approach" (3 June 2009), (<http://www.buddybuddy.com/d-p-scan.html>) (Retrieved: 22 July 2009).

¹⁷⁵ Speech by Prime Minister José Luis Rodríguez Zapatero during the final reading of the Bill in the Congress of Deputies (29 June 2005).

¹⁷⁶ Partners task Force For Gay And Lesbian Couples, "Registered Partnerships: The Scandinavian Approach" (3 June 2009), (<http://www.buddybuddy.com/d-p-scan.html>) (Retrieved: 22 July 2009).

writings against the legislation, and there were a number of protests by religious groups.¹⁷⁷ Late in 2004, the spokesman for the Spanish Bishops Conference, Antonio Martinez Camino, described the passage of the Bill as “imposing a virus on society. Something false that will have negative consequences for society”. Prior to his death, Pope John Paul had urged Spain to remember its Catholic roots and, subsequently, Pope Benedict has condemned marriage for same-sex couples as an expression of anarchic freedom.¹⁷⁸ In response to this, “[t]he Spanish population has indicated that it not only supports the gay marriage measure, but also thinks the church is out of touch with modern society”.¹⁷⁹ A survey undertaken in May 2005 found that 62% of Spaniards supported same-sex couples being able to marry with only 30% against.¹⁸⁰

COMMENT¹⁸¹

In 1999, two lesbian couples forwarded a complaint to the United Nations Human Rights Committee. Joslin v New Zealand alleged that the Government of New Zealand was in breach of its human rights obligations by denying access to marriage for same-sex couples. The complaint was to be unsuccessful.

Back in New Zealand, a new ‘gay-friendly’ Government looked as though it was going to produce some progressive changes. They had revived the earlier relationship property legislation, and proposed a Bill that would treat absolutely identically, in name and substance, partners to a marriage or a de facto relationship (whether different-sex or same-sex). In the final analysis, however, the legislation was amended so that married couples could reserve for themselves, within the legislation, the terms

¹⁷⁷ “Spain Bishops March Against Gay Marriage”, [PlanetOut Network](#) (17 June 2005).

¹⁷⁸ “Spain Defies Church to Legalise Gay Marriage”, Reuters (30 June 2005).

¹⁷⁹ “Spain Bishops March Against Gay Marriage”, [PlanetOut Network](#) (17 June 2005).

¹⁸⁰ Poll undertaken by Institutio Opina with a margin of error of 3%: Partners Task Force for Gay & Lesbian Couples, “Spain Offers Legal Marriage” (27 September 2006), <http://www.buddybuddy.com/mar-spai.html> (Retrieved: 21 December 2005).

¹⁸¹ The information contained in this section constitutes my comment based on information presented previously in this chapter. For that reason I have not directly referenced the source material for this section.

‘husband’ and ‘wife’, while those in other relationships would be referred to as partners. At least the substance of the legislation remained the same in the resulting Property (Relationships) Act 1976 (the changes were made as amendments to the previously existing Matrimonial Property Act 1976).

A further step forward was made with changes to the Human Rights Act 1993 (by virtue of the Human Rights Amendment Act 2001) which came into effect on 1 January 2002. The key changes of interest and importance were that:

- Government liability under the Human Rights Act 1993 was to be tested against the Bill of Rights standard, essentially meaning that detrimental different treatment constituted (unlawful) discrimination unless it could be ‘demonstrably justified’; and
- the Human Rights Review Tribunal (and courts on subsequent appeal) would have the power to make Declarations of Inconsistency, meaning that they could declare legislation to be inconsistent with New Zealand’s human rights standards.

The Civil Union Act 2004 came into effect on 26 April 2005. In March 2005, Parliament passed the Relationships (Statutory References) Act 2005 which amended a wide range of other statutes to include references to civil union and de facto partners.

But, while the New Zealand Parliament was passing into law, statutes that provided same-sex couples with the ability to register their partnerships, the number of overseas countries granting equal access to marriage for same-sex couples was increasing

By the time New Zealand couples (same-sex and different-sex) were able to enter into civil unions, marriage had come to The Netherlands (2001) Belgium (2003), Canada (2003) with retrospective effect as far back as February 2001 for some couples who had married in Ontario at that time), Massachusetts (2004), and Spain (2005). And, more countries were to follow over the next few years, as will be seen in the next (postscript) chapter.

New Zealand, a country that had once held itself out to be, and was seen by other countries to be, a world leader in human rights issues, was now providing us with a relationships recognition regime that was seen by many to be passé. Countries that had previously provided same-sex couples with registered partnerships were now moving to providing access to equal marriage either as well as, or instead of registered partnerships – for example, The Netherlands. Others were moving directly to providing access to equal marriage.

In Chapter 3 of this thesis, I highlighted the importance of respecting the dignity of persons, the importance of the full acceptance of gays and lesbians (whether individuals, couples and families) within society, and the importance of being able to participate fully within the society in which we live. To see these principles being applied, it is necessary only to take a glance towards:

- The Netherlands – where equal marriage rights stemmed from legislative action and did not follow on from court action; and
- Canada – where the Courts leant heavily on the concept of personal dignity, and the federal Government played a proactive role in bringing same-sex marriage to reality by choosing not to appeal court decisions, and by submitting its proposed gender-neutral legislation to the Supreme Court for ‘approval’; and
- Massachusetts – where the Legislature sought an advisory opinion from the Supreme Judicial Court of Massachusetts as to whether or not civil unions would be an adequate response to the constitutional requirements outlined by the Court in its decision on the same-sex marriage case. When the Court responded “No”, that civil unions would not suffice, the Legislature approved equal access to marriage; and
- South Africa – where the legislature, having only put behind it a few years previously an oppressive racial apartheid regime, took the decision of the Constitutional Court of South Africa and turned it into access to equal marriage rights for same-sex couples.

While the New Zealand Government, at the time of the passing of the Civil Union Act 2004, maintained that this was a pragmatic approach that would later lead to same-sex marriage, there has, to this point at least, been no indication that access to marriage for same-sex couples is likely to result from a Government-led initiative. If there is to be any progress on this issue in New Zealand in the near future, it seems that the onus falls to those same-sex couples who might wish to marry in New Zealand to take the initiative again.

Chapter 9

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2007 ONWARDS

Introduction

As explained in Chapter 1, this thesis has a cut-off point as at the end of 2006. For this reason, I do not attempt to provide a detailed analysis of the events and progress made in New Zealand or any overseas countries from this date onwards.

This chapter is designed to, at a very high level:

- highlight some of the further developments and progress towards equal access to marriage for same-sex couples that have occurred since the beginning of 2007; and
- provide a brief commentary on how these changes might impact on the discussion of this thesis

RECENT DEVELOPMENTS

My intention is that, in light of the discussions presented in this thesis, if the reader finds any of these areas of particular interest that they will take the time to follow up and find out more about them.

In some jurisdictions there have been significant changes since the beginning of 2007. These will be outlined briefly below.

In other jurisdictions that I have examined quite closely in this thesis, there has been further consolidation of the recognition regimes and the entitlements they attract. This has included, for example, greater access to adoption rights and access to artificial birth technology in a number of countries.

New Zealand

General Comment

There has been no significant progress since the passing of the Civil Union Act 2004 and the Relationships (Statutory References) Act 2004.

There have been some further changes, for example:

- The Wills Act 1837 (UK), which was still effective in New Zealand until recently, has now been replaced by a new Wills Act 2007. The new Act provides for civil union partners.
- There have been some changes with regard to citizenship, taking account of civil union partners.

However, the two most significant pieces of legislation – the Marriage Act 1955 and the Adoption Act 1955 – remain untouched and every indication to date is that the possibility of any change being initiated through policy or legislative means is very slim.

It appears that, in New Zealand, unless those same-sex couples who wish to gain access to equal marriage rights, or wish to gain access to equal adoption rights initiate further action, there will be no further progress on these issues.

Adoption

Within the last few days of finalising this thesis, the Adoption Act 1955 made it back into the news. There are several interesting features of the recent discussion – many of which reiterate and support points made in this thesis. I consider it pertinent, therefore, to make reference to these key points.

Judge Paul von Dadelszen, Acting Principal Family Court Judge, has stated that:¹

- the 2004 Civil Union Act placed people in de facto relationships and same-sex couples on the same legal footing as married couples, except in the area of adoption;
- the fact that the law does not permit unmarried people or same-sex couples to apply to adopt is inconsistent with Bill of Rights

¹ Radio New Zealand, “ ‘Checkpoint With Mary Wilson’: Top Judge Says De Facto And Gay Couples Should Be Able To Adopt”, 5:15pm on 19 August 2009 (including sound recording of Judge von Dadelszen),

legislation and the United Nations Convention on the Rights of the Child;

- the prime consideration in relation to adoption should be the “welfare and paramount interests of the child”;
- “New Zealand is lagging behind” overseas countries on this issue.
- the laws on adoption in New Zealand need to be amended;

A contrary view was expressed by Wellington Roman Catholic Archbishop, John Dew, who said:²

- “I think this is coming from the point of view of the same-sex couples and what they think are their rights”.
- “Here we’re concerned about what the rights of a child are, and they have a right to be raised in a loving, stable and committed relationship which, we as a church would say, are best in a marriage situation”.

An in a further interview on Radio New Zealand, Judge von Dadelszen said:³

- “The Adoption Act 1955, obviously from the date of its passing, is well over 50 years old. It was passed at a time that ... in accordance with the Anglo-Saxon values of the 1950s. We’ve now moved on from that”.
- “What I said in my paper, one of the quotes in my paper, simply was this, and I’ll quote it: ‘The psychological research does not support any scientific basis for discrimination against homosexuals with regard to fitness to parent. The fitness and suitability of gay and

<http://www.radionz.co.nz/national/programmes/checkpoint> (Retrieved and transcribed: 20 August 2009: Nigel Christie).

2 Radio New Zealand, “ ‘Checkpoint With Mary Wilson’: Top Judge Says De Facto And Gay Couples Should Be Able To Adopt”, 5:15pm on 19 August 2009 (including sound recording of Archbishop Dew),

<http://www.radionz.co.nz/national/programmes/checkpoint> (Retrieved and transcribed: 20 August 2009: Nigel Christie).

3 Radio New Zealand, “ ‘Nine-To-Noon’: Same-Sex Couple Adoption”, 9:05am on 20 August 2009, Judge von Dadelszen interviewed by Kathryn Ryan, <http://www.radionz.co.nz/national/programmes/ninetoon/20090820> (Retrieved and transcribed: 21 August 2009: Nigel Christie).

lesbian parents or foster parents needs to be considered on a case-by-case basis as it is for heterosexual parents' ”.

- And, when asked whether or not practical problems are created one partner can adopt but their life partner has no legal attachment or recognition with the child, Judge von Dadelszen responded: “I am not so sure that it is important to talk about practical problems”. he then went on to comment that, although there can be practical issues, this was also a matter of discrimination and a matter of principle.
- And, when asked about whether there should be a social debate on whether or not same-sex couples should be able to adopt, Judge von Dadelszen responded: “Of course there has to be a debate. I am not for one moment pretending that there shouldn't be, but my belief is that New Zealand society, in this day and age, should accept that there are all sorts and conditions of men and women and that nobody should be discriminated against”.

And from a political point of view, the following comments have been made:

- Metiria Turei, Green Party MP, says: “If the debate had happened at the time that other pieces of legislation ⁴ were being amended we would have been able to have that discussion in context. As it happens, leaving it out means that the discussion is highlighted and out of the context of ensuring that gay and lesbian people have exactly the same legal rights, entitlements and responsibilities as every other citizen”.⁵
- But the Lianne Dalziel, Justice spokesperson for the Labour Party, says the Care of Children Act 2004 covers the guardianship rights of same-sex couples. She says the 1955 Adoption Act was left out of that process of law reform because it needs to be totally overhauled.

⁴ Metiria Turei is here referring to the Civil Union Act 2004 and the Relationships (Statutory References) Act 2004.

⁵ Radio New Zealand, “ ‘Checkpoint With Mary Wilson’: Top Judge Says De Facto And Gay Couples Should Be Able To Adopt”, 5:15pm on 19 August 2009 (including sound recording of Metiria Turei), <http://www.radionz.co.nz/national/programmes/checkpoint> (Retrieved and transcribed: 20 August 2009: Nigel Christie).

“There was certainly a view that it was inappropriate to make a change to it when so much of that law is now completely and utterly irrelevant and out of date”.⁶

- Hon Simon Power, Minister of Justice, says a review of the Adoption Act is not on the Government’s work programme.⁷

The revived adoption debate therefore revives a number of issues already discussed in this thesis, including:

- State discrimination against same-sex couples;
- the failure of the Civil Union Act 2004 and the Relationships (Statutory References) Act 2004 to equal legal entitlements and status to same-sex couples;
- New Zealand’s place, in comparison with overseas jurisdictions with regard to the treatment of same-sex couples;
- the conservative view that the only ‘stable’ family is the family founded on marriage, and the suggestion that same-sex couples are not capable of forming stable, loving and committed relationships;
- The current views lean on tradition for justification and society has now ‘moved on’ from this old values.
- There is no evidence to suggest that children are disadvantaged by being brought up in same-sex families.
- The fact that this is not just a ‘practical’ issue, but is a matter of human rights principle and equal treatment.
- The question of the appropriateness of public consultation on rights issues in the face of the view that “New Zealand society, in this day and age, should accept ... that nobody should be discriminated against”.

⁶ Radio New Zealand, “ ‘Checkpoint With Mary Wilson’: Top Judge Says De Facto And Gay Couples Should Be Able To Adopt”, 5:15pm on 19 August 2009 (including sound recording of Lianne Dalziel), <http://www.radionz.co.nz/national/programmes/checkpoint> (Retrieved and transcribed: 20 August 2009: Nigel Christie).

⁷ Radio New Zealand, “ ‘Checkpoint With Mary Wilson’: Top Judge Says De Facto And Gay Couples Should Be Able To Adopt”, 5:15pm on 19 August 2009, <http://www.radionz.co.nz/national/programmes/checkpoint> (Retrieved and transcribed: 20 August 2009: Nigel Christie).

On 20 August 2009, an Adoption Amendment Bill, previously prepared and placed in the Members' ballot by Metiria Turei, was returned to the ballot as a Bill sponsored by her fellow Green MP, Kevin Hague. Any progress of this Bill, and the debate it generates, will be watched with extreme interest.

OVERSEAS

Norway

Norway became the sixth country to provide equal access to marriage for same-sex couples.

Equal marriage was passed into law on 11 June 2008 and came into effect on 1 January 2009.

Sweden

Sweden became the seventh country to provide equal access to marriage for same-sex couples.

Equal marriage was passed into law on 1 April 2009 and came into effect on 1 May 2009.

United States of America

The country that has seen the most activity, since the beginning of 2007 up to the present, is the United States of America, with access to marriage being provided in 6 new States during this time (that is, in addition to Massachusetts where equal marriage became a reality in 2004). The United States of America has also seen more activity related to the passing of constitutional amendments or defense of marriage legislation in some States to prevent the recognition of same-sex marriages.

States where access to marriage for same-sex couples has been achieved include:

TABLE 9: EQUAL MARRIAGE – 2007 to PRESENT		
State	Passed / Decided	Effective
California – see note below	15-May-2008	16-Jun-2008
Connecticut ⁸	10-Oct-2008	28-Oct-2008
Iowa ⁹		27-Apr-2009
Maine – see note below	06-May-2009	14-Sep-2009
Vermont ¹⁰	07-Apr-2009	01-Sep-2009
New Hampshire ¹¹		01-Jan-10

California (Part 2)

On 15 May 2008, the Supreme Court of California overturned the California State ban on access to marriage for same-sex couples.¹² As from 16 June 2008, same-sex couples could marry. Marriage had come to California as a result of a court decision. However, it was to be overturned in a manner somewhat similar to what had earlier happened in Hawai'i and Alaska.

On 4 November 2008, citizens of California voted on Proposition 8 and, as a result, Section 7.5 was added to Article I of the California Constitution, so that it now read:

Section 7.5. Only marriage between a man and a woman is valid or recognized in California.

⁸ Kerrigan v Commissioner of Public Health 289 Conn. 135, 957 A.2d 407 (2008).

⁹ Varnum v Brien 763 N.W.2d 862, (Iowa 2009).

¹⁰ State of Vermont Bill S.115: "An Act to Protect Religious Freedom and Recognize Equality in Civil Marriage". Passed by General Assembly on 7 April 2009 and effective from 1 September 2009.

¹¹ State of New Hampshire Bill HB.73: "An Act affirming religious freedom protections with regard to marriage and prohibiting the establishment of civil unions on or after January 1, 2010".

¹² In re Marriage Cases (2008) 43 Cal.4th 757 [76 Cal.Rptr.3d 683, 183 P.3d 384].

The estimated 18,000 same-sex marriages that were solemnised in California between 16 June 2008 and 4 November 2008 remain extant.

Further court challenges are expected, with a view to overturning the State ban and reinstating same-sex marriage.

Maine

On 6 May 2009, Maine Governor John Baldacci signed legislation allowing same-sex marriage in Maine. Maine became the 5th State in the United States of America to offer same-sex marriage.¹³

In July 2009, however, opponents of Maine's new law allowing same-sex marriage submitted petitions seeking a referendum on the issue. If sufficient signatures are certified (the number required being 55,087) by 4 September 2009, a referendum will be held in November. The marriage law, that was to come into effect on 12 September has be put on hold pending the outcome.¹⁴

Massachusetts (Part 2)

In July 2009, the State of Massachusetts file a suit against the Government of the United States with regard to the federal Defense of Marriage Act. The suit argues that the Defense of Marriage Act "constitutes an overreaching and discriminatory federal law", and unfairly denies federal benefits to the 16,000 or so same-sex couples who have married in Massachusetts.¹⁵

¹³ "Gay Marriage Becomes Law In Maine", 365Gay.com (6 May 2009), <http://www.365gay.com/news/gay-marriage-becomes-law-in-maine/>, (Retrieved: 7 May 2009).

¹⁴ "Maine Gay Marriage Opponents Submit Challenges", 365Gay.com (31 July 2009), <http://www.365gay.com/news/maine-gay-marriage-opponents-submit-challenges/>, (Retrieved: 1 August 2009).

¹⁵ "Mass. Sues Feds Over Definition Of Marriage", 365Gay.com (8 July 2009), <http://www.365gay.com/news/mass-sues-feds-over-definition-of-marriage/y>, (Retrieved: 09 July 2009).

Louisiana

On 2 April 2009, a Louisiana couple was refused a marriage licence by the Orleans Parish marriage license office. They have filed a lawsuit claiming that the New Orleans' constitutional amendment against gay marriage violates their constitutional rights under the U.S. Constitution.¹⁶

Pennsylvania

A Marriage Equality Bill has been introduced into the Pennsylvania Senate. The Bill is awaiting further consideration.¹⁷

Other States

While progress towards same-sex marriage is made in some States, and while California has received much attention with regard to the Proposition 8 negation of same-sex marriage, there are on-going challenges, both reactive and pre-emptive, to same-sex marriage in various States. For example, on 4 November 2008, the same day that marriage was overturned in California by Constitutional Referendum, similar referenda were also held in response to 'initiatives' in other States.¹⁸

¹⁶ "Louisiana Gay Couple Sues For Marriage License", 365Gay.com (1 July 2009), <http://www.365gay.com/news/louisiana-gay-couple-sues-for-marriage-license/>, (Retrieved: 02 July 2009).

¹⁷ "Pennsylvania Senators introduce Marriage Equality Bill", 265Gay.com (10 July 2009), <http://www.365gay.com/news/pennsylvania-senators-introduce-marriage-equality-bill/> (Retrieved: 11 July 2009).

¹⁸ The term 'initiative' is used to describe a proposal for Constitutional amendment that is voted on by eligible voters in the relevant State by way of a State-wide referendum.

As a result of these referenda, the following constitutional amendments also occurred:¹⁹

TABLE 10: FURTHER STATE INITIATIVES (USA)		
State	Initiative	Vote In Favour
Florida	marriage limited to different-sex couples	62%
Arizona	marriage limited to different-sex couples	56%
Arkansas ²⁰	adoption and fostering of children limited to couples who are legally married	57%

COMMENT

Increase in demand for marriage

In the period from the beginning of 2007 to the present, there have been two countries that have enabled equal access to marriage for same-sex couples (Norway and Sweden) – making 7 countries in all (Canada, The Netherlands, Belgium, Spain, South Africa, Norway and Sweden).

In that same period, six States within the United States of America have enabled access to marriage for same-sex couples (California, Connecticut, Iowa, Maine, Vermont and New Hampshire). One of these (California) was subsequently overturned by constitutional referendum, and in one State (Maine) a challenge to same-sex marriage is still pending. However, currently, there are seven States in the United States that provide access to marriage for same-sex couples.

However, it is important to emphasise that, although I have not analysed these cases or legislative developments in detail, I do not consider that the message of my thesis is compromised in any way.

¹⁹ Results downloaded from “CNN Election Centre 2008: Ballot Measures”, <http://www.cnn.com/ELECTION/2008/results/ballot.measures/> (Retrieved: 5 November 2008).

²⁰ Note that Arkansas already had a constitutional amendment banning same-sex marriage.

The fact that these developments continue overseas gives further weight to my key points that:

- there is a strong demand for access to marriage amongst same-sex couples whether this be driven:
 - by a desire for access to the entitlements that flow from marriage, or
 - by a desire to be treated equally before and under the law;
- registered partnerships, while once seen as a progressive alternative to marriage, are now seen as inadequate in terms of equality and dignity;
- in the international context, New Zealand is falling behind and increasing number of countries in terms of full and equal recognition of same-sex couples.

Uptake of Civil Unions

Another factor worth considering briefly is the uptake of registered partnerships.

In this thesis, I have made the claim that there is a demand for marriage amongst a significant number of same-sex couples. I have also made the claim that registered partnerships do not provide everything that marriage provides, and that there is also a significant number of same-sex couples who do not wish to avail themselves of registration.

I have selected as an indication of the measure of uptake of registered partnerships:

- Vermont, which was the first State in the United States of America to offer their form of registered partnerships; and
- New Zealand, which has had registered partnerships since April 2005.

Vermont

Being a relatively small State, Vermont has a population of 621,270.²¹ The statistics provided here relate to Vermont residents only and do not include marriages or civil unions, in Vermont, of persons from out of State.

It should be noted that, differently from New Zealand, civil unions in Vermont were available only to same-sex couples. Different-sex couples have not been able to enter into civil unions.

The following table shows that, with the advent of civil unions in 2000, there was a reasonably significant uptake initially. This dropped quickly from 17%, as compared with the number of marriages, in the first year to only 6.7% in the second year. From 2003 to 2005 the percentage settled to a figure of about between 3.3% and 4%.²²

TABLE 11: MARRIAGES AND CIVIL UNIONS IN VERMONT						
	2000	2001	2002	2003	2004	2005
Marriages	4189	3784	3937	3958	3910	3812
Civil Unions	375	252	171	140	157	126
Percent Civil Unions of Marriage	17.0%	6.7%	4.4%	3.5%	4.0%	3.3%

In general terms, the number of civil unions in Vermont shows a steady decline over the six-year period. One reason for this might be that nearby Massachusetts had been successful in attaining equal marriage rights by this time, as had Canada across the northern border. Perhaps same-sex couples in Vermont saw marriage as a viable option, rather than civil unions, either by travelling to those jurisdictions or by waiting until marriage came to Vermont (which it subsequently did).

²¹ As at 1 July 2008. Population information from the United States Census Bureau, <http://quickfacts.census.gov/qfd/states/50000.html> (Retrieved: 22 August 2009).

²² All statistical information relating to Vermont from the Vermont Department of Health, <http://healthvermont.gov/research/index.aspx> (Retrieved 21 August 2009).

New Zealand

New Zealand has a population of 4,315,800.²³ The statistics provided here relate to marriages and civil unions of New Zealand residents and overseas citizens who marry or enter into a civil union in New Zealand.²⁴ It should be remembered also that, unlike Vermont, in New Zealand both same-sex and different-sex couples can enter into a civil union. Of course, marriage is reserved for different-sex couples only.

Table 12 provides information on the number of marriages solemnised in New Zealand.

MARRIAGES IN NEW ZEALAND				
	2005	2006	2007	2008
Marriage NZ Resident	20470	21423	21494	21948
Marriage OS Resident	2046	2021	1953	2000
Marriage Total	22516	23444	23447	23948

Table 15 provides the number of all civil unions registered in New Zealand by same-sex or different-sex couples, or by overseas citizens temporarily in New Zealand.

It is interesting to note that the civil union was made available to different-sex couples for two reasons:

- it was considered that it would be discriminatory to exclude same-sex couples from the Civil Union Act 2004; and
- it was suggested that there was a demand from different-sex couples to be able to have a civil union rather than marriage.

²³ As at 1 July 2009. Population information from Statistics New Zealand, <http://www.stats.govt.nz/top-20-statistics.aspx> (Retrieved: 22 August 2009).

²⁴ All statistical information relating to New Zealand from Statistics New Zealand, <http://search.stats.govt.nz/search?w=marriage&af=ctype%3Astatistics> (Retrieved: 3 June 2009).

TABLE 13: CIVIL UNIONS IN NEW ZEALAND				
	2005	2006	2007	2008
CU NZ Resident Male Same-Sex	98	115	103	111
CU NZ Resident Female Same-Sex	105	182	150	145
CU NZ Resident Different-Sex	44	77	63	71
Marriage Converted to CU	2	0	0	0
CU NZ Resident Total	249	374	316	327
CU Overseas Resident	29	56	77	78
Total Civil Union	278	430	393	405

TABLE 14: NEW ZEALAND CIVIL UNIONS COMPARED WITH MARRIAGES				
	2005	2006	2007	2008
% NZ Resident Civil Unions cf Marriage	1.21	1.75	1.47	1.49
% Overseas CU cf Overseas Marriages	1.42	2.77	3.94	3.90
% All Civil Unions cf Marriage	1.20	1.83	1.67	1.69
% NZ Residents Different-Sex Civil Unions cf Marriage	0.22	0.35	0.29	0.32

Interesting points that arise from these statistics include the following:

1. The Civil Union Act 2004 s.18 enables different-sex couples to convert a civil union into a marriage, or a marriage into a civil union. It is noticeable that over a period of four years, only two different-sex couples have chosen to convert from marriage to civil unions(see Table 13).
2. The percentage of all New Zealanders who enter into civil unions as compared with marriages rises from 1.21 (2005) to 1.79 (2006) and then falls to 1.47 and 1.49 (2007 and 2008 respectively). These figures are lower than those for Vermont (the lowest percent in Vermont being 3.3 in 2005) (see Table 14).
3. The percentage of overseas persons temporarily in New Zealand who enter into civil unions as compared with marriages shows a year-by-year increase from 1.42 (2005) to 3.90 (2008). Based on these percentages, we could be seen to be providing a 'civil union service' to overseas citizens (see Table 14).

In general, the uptake of registered partnerships by same-sex couples has not been overwhelming. Insufficient research has been done on the reasons for this, but I would like to think that it is because, although there are some practical advantages from entering into a registered partnership, full dignity and acceptance can be attained only by equal access to marriage.

CONCLUSION

Again, while I have not dealt with any of the developments in this chapter in any detail, my intention is that the information given is sufficient to prompt the interested reader in following up further on these and any subsequent developments.

PART IV

CONCLUSION

Part IV consists of one chapter that constitutes the Summary and Conclusion for this thesis.

First, subsequent to an introductory section, I summarise what I consider to be the key themes of this thesis. This, for me, include some of the key contextual issues that must be kept in mind by all persons considering the issue of access to equal, civil-legal marriage for same-sex couples.

Second, I present a range of options for possible future actions towards equal recognition of the relationships of same-sex couples. There are, of course, two key avenues for change – the legislature, and the courts. Options are provided for placing the issue before either of these fora, with an assessment needing to be undertaken with regard to the appropriateness of each.

Third, I outline some points for consideration with regard to increasing the chance of success if we, as same-sex couples, decide to take further action towards seeking equal recognition of our relationships.

Chapter 10

SUMMARY and CONCLUSION

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INTRODUCTION

It is my thesis that there is no valid impediment to marriage for same-sex couples in New Zealand.

This is not to say that, currently, same-sex couples are not debarred from marrying in New Zealand. Rather, what it is saying is that it is my considered opinion that there is no reasonable and lawful impediment, and that under a reasoned, logical and proper assessment in accordance with the New Zealand Bill of Rights Act 1990 s.5, same-sex couples should be entitled to marry under existing marriage legislation.

Furthermore, it is my view that the New Zealand Court of Appeal, in 1998, did not hold that there is no discrimination resulting from the exclusion of same-sex couples from the Marriage Act 1995.¹ What the Court did say was that, regardless of whether or not discrimination existed, any change to the Marriage Act would need to result from the actions of Parliament.

Unfortunately, what has prevailed in New Zealand with regard to the issue of same-sex marriage is political pragmatism and majority rule in the face of purported human rights protections.

There are essentially two types of arguments that can be presented in relation to the issue of same-sex marriage:

- Those based in a principled human rights argument – human rights legislation being part of the social, legal, justice and constitutional framework of New Zealand.
- Those based in emotive and morality-based arguments – which do not reach the level of objective justification required by that human rights law.

This chapter reviews the key themes of this thesis, examines options for progressing the issue of same-sex marriage, and what changes there might need to be to enhance the possibility of success for any of these options.

¹ See detailed discussion on this point in Chapter 7.

KEY THEMES

Dignity

In Chapter 3, I provided a consideration of the concept of ‘dignity’ and the dignity of the person.

In essence, an understanding and acceptance of the concept of human dignity is a fundamental element of human rights law. Dignity is about equality, equal treatment before and under the law, and concern respect and consideration.

The concept of dignity has been a core component of modern human rights laws since the drafting in the mid-1900s of the early United Nations documents and more latterly in the international covenants.

It has been notable that the cases on same-sex marriage have evolved from cases where the concept of dignity was essentially absent, such as:

- Jones v Hallahan,² a case that hinged on the traditional meaning of marriage without reference to the rights of the persons concerned; or
- Quilter v Attorney-General,³ where Gault J declared (in obiter) that he considered that:
 - there was no discrimination on the basis of gender because the marriage licence would have been declined regardless of whether the parties were two men or two women; and
 - there was no discrimination on the basis of sexual orientation because the marriage licence would have been declined to two men, for example, regardless of whether they were homosexual or heterosexual.

In more recent times, the courts have moved to a substantive

² Jones v Hallahan (1973) 501 S.W.2d 588 (Ky. Ct. App. 1973).

³ Quilter v Attorney-General [1998] 1 NZLR 523.

consideration of issues such as the care and concern, respect and dignity of the person. This has been particularly apparent in the Canadian cases and the cases in South Africa and in Massachusetts.

It has also been noticeable, in a number of jurisdictions, that the State has taken a lead role in extending equal marriage rights to same-sex couples. This has been demonstrated in Canada, where the Government has chosen not to appeal decisions of the court, or where the Government has sought to clarify the efficacy of proposed legislation and its compliance with the earlier decision of the Court.⁴ Similarly, the legislature in Massachusetts sought an Advisory Opinion from the Supreme Court of Massachusetts on whether or not registered partnerships would provide an appropriate response to the State Constitution and the earlier decision of the Court in *Goodridge*.⁵ In other jurisdictions, such as The Netherlands, Belgium, Maine and New Hampshire (amongst others), the equal marriage initiatives have been driven through the legislature.

It is this act of shifting the onus for driving change away from the affected minority group that is demonstrative of an enhanced recognition of the dignity of the person. There is nothing dignity-enhancing for a minority group in needing to shout louder and louder, and to 'stamp their feet' to draw attention to themselves, in order to be heard. But, where the State takes responsibility for providing protections and entitlements to its citizens rather than expecting its citizens to fight for the protections and entitlements to which they are due, the dignity of those persons is enhanced and preserved.

Different jurisdictions have approached the issue of access to equal marriage for same-sex couples in very different ways. These can be

⁴ The Canadian Government, by way of reference to the Supreme Court of Canada, sought comment on its proposed marriage legislation and its compliance with the decision of the Court in the marriage case and, therefore, its compliance with the Canadian Charter of Rights and Freedoms.

⁵ Supreme Judicial Court of Massachusetts, "Opinions Of The Justices To The Senate", 440 Mass. 1201, 802 N.E.2d565 (3 February 2004).

categorised loosely into 4 main groupings, as follows:

TABLE 15: APPROACHES TO ATTAINING EQUAL MARRIAGE RIGHTS		
Approach	Jurisdiction Example	Result / Effect
Process initiated through legislature – no need for affected persons to seek access to their rights through the courts	Netherlands	Respecting, enhancing, promoting dignity of the person – full and equal citizenship
Citizens initiate the process through the courts, but legislature follows up proactively	Canada	Respecting, enhancing, promoting dignity of the person – full and equal citizenship
Citizens initiate the process through the courts, but legislature follows up reactively	Massachusetts	Reluctantly respecting the dignity of the person and providing full and equal citizenship
Citizens initiate the process through the courts – no response from legislature	New Zealand	Demeaning of the dignity of the person and not providing full and equal citizenship

Tolerance or acceptance?

It is my view that, in order for us, as gays and lesbians, to be full citizens of the country in which we live, we must enjoy full acceptance as individuals, as couples and as families.

To limit our participation in society by circumscribing those rights to which we may have access is to deny us our humanity and our dignity and our freedom.

To permit us access to only some of those rights which are available to others is to utilise the power of majority rule to control the extent to which we can realise our full potential as members of society.

To place these limitations upon us, whether lawfully or otherwise, is to tolerate our presence. To remove those limitations and provide us with the same autonomy that non-gay and non-lesbian citizens enjoy is to accept us as equal citizens.

While it is accepted that a change to inclusive legislation, as in equal access to marriage, will not automatically and immediately bring about a change in attitudes, it is acknowledged that legislative change will allow such a shift in attitudes to occur. Conversely, if legislation does not change it will serve to impede attitudinal change.

Similarly, where societal attitudes move ahead of those of the legislature, we cannot guarantee that the legislature will follow the views of society. But hopefully, the views expressed by society at large will have some level of influence on our legislators.

During the Third Reading of the Civil Union Bill, Russell Fairbrother MP, a proponent of the Bill, responded to Winston Peters' suggestion that the Civil Union Bill is a "sop to the gay community" by saying:⁶

... this bill is a sop to the gay community, but it is one that many of its members welcome with open arms, and some of them reject because they still feel as though they are being treated as second-class citizens. It is a sop because we are not offering the gay community and others, those who cannot marry in this country but want to have legal relationships, the equality of society. We are not offering them the warmth of humanity. We are offering them the cold face of legal equality. The cold face of legal equality is only that.

Objective reasoning

Most of the arguments that are promulgated to justify the different treatment of same-sex couples fail the objectivity test. To reach the New Zealand Bill of Rights 1990 s.5 standard, limitations on the prohibitions

⁶ Russell Fairbrother, MP, Hansard: Parliamentary Debates, Third reading of the Civil Union Bill (9 December 2004). This statement is along similar lines to the statement of the Chief Justice of Canada who talked of the "formal" equality that arises from regimes such as civil unions, as opposed to the full equality that would be achieved through access to marriage.

against discrimination as outlined in New Zealand human rights laws, must be “reasonable limits (prescribed by law)” that can be “demonstrably justified”.

An analogy often cited is that, in New Zealand, we do not permit persons under the age of 15 years to obtain a licence to drive a car. This, it is said, is a limitation on young persons that could be seen as being akin to not permitting same-sex couples to obtain a licence to marry. What is left out of that argument, however, is that the decision not to permit young persons to drive has been based on a reasoned consideration of the relevant issues such as maturity and public safety. There is a requisite age for two persons to obtain a marriage licence, but that is not the issue. The issue here is that we do not prevent all gay and lesbian persons, or all women, or all men, or all Maori, from obtaining a driving licence on the basis that to permit any one of those groups to have a driving licence would undermine the efficacy of driving licences generally. It is the arbitrariness of the exclusion and the fact that it is related to a particular class of persons rather than the exclusion itself. Therefore, just as it can be proven objectively (rationally, based in reason, without prejudice, not subjectively) that to enable persons of too young an age to have a licence to drive a car could be dangerous to that young person or to society at large, so must it be proven that to provide same-sex couples with the ability to marry will be dangerous to the couples concerned or society at large.

Moral argument, religious argument, and personal opinion, do not constitute rational, objective reasoning.⁷ Although tradition and social values are important, they cannot be given so much weight that they alone will justify a discriminatory statutory classification. When tradition is the guise under which prejudice or animosity hides, it is not a legitimate state interest. Similarly, expressing a moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest.

It is my contention that none of the arguments put forward as “justified limitations” reach the required threshold.

⁷ Deane et al v Conaway et al (unreported, Circuit Court, Baltimore City, Case No. 24-C-04-005390: 19 January 2006): citing Romer v Evans, 517 U.S. 620, 634-35, 116 S.Ct. 120, 1628 (1996); and Lawrence v Texas, 539 U.S. 558, 582-583, 123 S.Ct. 2472, 2486 (2003).

The failure of incrementalism

With regard to the issue of access to marriage for same-sex couples, an extremely significant principle of human rights implementation and application is that civil and political rights are immediately enforceable. Because of the nature of civil and political rights – essentially to do with what constitutes acceptable treatment of an individual – there is no room for half measures.

The policy of Government to realise civil and political rights – the rights associated with prohibitions against discrimination – on an incremental basis is a fundamentally flawed policy, and is offensive to those seeking access to those rights.

It is not logical to say that we are partly or nearly equal to others. For example, to say that civil unions are almost equal to marriage is oxymoronic. Something is either equal or it is not.

Nor is it logical to say that we are more equal now than we have been previously. Once again, to say that civil unions provides us with a greater degree of equality than we had previously is oxymoronic.

I recall that, during the Conference Dinner for the Conference in Turin 2002,⁸ one of the delegates from Quebec, Canada, announced that she had just received a phone call telling her that the legislature of Quebec had approved same-sex marriage. She then added that, actually, it was just like marriage except it was not called marriage – it was called civil partnerships. Also, it was just like marriage except there were some entitlements that flowed from marriage that were not going to be attached to these civil partnerships. Another delegate then stood and urged everyone in the room not to call these arrangements – civil unions, registered partnerships, civil partnerships and the like – marriage. He added: “The moment we have to add the word ‘except’, we have discrimination”.

⁸ “Marriage, Partnerships And Parenting In The 21st Century. The Current International Situation And New Perspectives For Gay, Lesbian, Bisexual And Transgendered People And Their Families – A Comparative Approach”, International Conference, Turin, Italy (5- 8 June 2002).

New Zealand human rights climate

New Zealand has long enjoyed an international reputation as a “champion” of human rights standards and the observance of those standards. This reputation began many decades ago with issues of enfranchisement, the most well-known being the granting to women in 1893 of the right to vote – New Zealand being the first country in the world to do this. Similarly, New Zealand was relatively quick, in terms of colonial settler governments, to grant the right to vote to the “native” people.

New Zealand’s lead on nuclear issues has been noticed internationally. New Zealanders’ active opposition to the apartheid regime in South Africa, particularly in the 1980s, drew world-wide attention. Over the decades New Zealand has played a visible role in human rights matters, with peace-keeping support in East Timor and the middle-East, a presence on the United Nations Security Council, and an active role in the United Nations generally.

In the early 1990s, New Zealand passed into law the New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993. There have also been subsequent amendments that have served to strengthen both statutes.

However, there is a seeming reticence of New Zealand’s Parliament to utilise these human rights standards consistently, particularly in relation to issues that might be controversial, and a sense that preservation of New Zealand’s international reputation is rates higher than attention to detail at home. I would suggest that New Zealand has a human rights climate that favours ensuring that all its citizens are treated with the equal dignity, care and concern to which they are entitled.

There is potential within the current legislative framework for enhanced compliance with human rights standards and enhanced recognition of the rights of protected groups. While human rights laws in New Zealand are not entrenched and not supreme, adherence to them is not reliant on them being so. If we as a community – individuals, groups, representatives, power-holders, and power-brokers – have a practical

commitment to the human rights standards we have adopted, and if we have the courage to advocate for those rights for ourselves and for others, the current human rights rules adopted by New Zealand should prove perfectly adequate.

Furthermore, when we consider the matters mentioned above in relation to which New Zealand has set standards to be followed internationally, it is clear that, when New Zealand and New Zealanders have the will, they can demand, promote and protect those rights they value.

It is useful, I think, to view the role of human rights legislation through a similar lens to that which Justice Chilwell employed in his consideration of the role of the Treaty of Waitangi in New Zealand. To paraphrase Justice Chilwell:⁹

there can be no doubt that human rights legislation (domestic and international) is part of the fabric of New Zealand Society.

OPTIONS FOR PROGRESS

At this stage, rightly or wrongly, the onus has fallen to same-sex couples in New Zealand, as the aggrieved party, to initiate the process of change. The key issue is therefore related to what might be the possible options for taking further action.

As has been discussed in some detail, the Quilter same-sex marriage case focused on seeking a declaration from the courts that same-sex couples should be able to marry under the existing Marriage Act 1955. It was submitted that the Marriage Act 1955 was, in its very essence, silent as to the gender of the parties to a marriage, and could therefore be interpreted to include same-sex couples. The Court of Appeal held that the definition of marriage was so clear – as being between a man and a woman only – that it was not possible for the Court to expand the meaning to allow same-sex couples to marry. Any such change would have to come from the legislature.

⁹ Huakina Development Trust v Waikato Valley Authority [1987] 1 NZLR 641 (per Chilwell J): “There can be no doubt that the Treaty is part of the fabric of New Zealand society.”

In broad terms, we have two possibilities:

- place the issue before the courts; and / or
- take the issue back into the legislature.

It is my view that, if we are to make progress, the most likely course of action is to place the matter of same-sex marriage back before the courts. However, in doing so, we must ensure that the issue we place before the courts should be different from that in Quilter.

In summary, the possible actions could be any or all of the following:

TABLE 16: OPTIONS FOR FUTURE ACTION ON SAME-SEX MARRIAGE	
Change Through Legislature	
1.	Repeal the Civil Union Act 2004
2.	Amend the Marriage Act 1955
3.	Entrench the New Zealand Bill of Rights Act as supreme law
Change Through Courts	
4.	Declaration of Inconsistency – directly, in relation to the Marriage Act
5.	Declaration of Inconsistency - indirectly, in relation to the Adoption Act
6.	Declaration that same-sex marriages performed in Canada are legally recognised in New Zealand
7.	Couple married in Canada challenge New Zealand law by seeking access to legal provisions (eg joint adoption) that require the couple to be ‘spouses’

I will discuss each of these briefly, and then draw from the thesis, some of the issues identified that would need to change in order to ensure success with any of these initiatives.

Repeal the Civil Union Act 2004

On the basis that the Civil Union Act 2004 does not provide full and equal treatment to same-sex couples and, on the basis that the uptake of

civil unions has been exceedingly low, it is worth considering repealing the Civil Union Act 2004.

If there were to be a successful amendment to the Marriage Act 1955, as suggested in the next section, existing civil unions could be converted to marriages.

Amend the Marriage Act 1955

In light of the degree of attitudinal shift across many jurisdictions, it could be worth seeking an amendment to the marriage Act 1955 to enable equal access to marriage for same-sex couples.

While this was previously discounted on the basis that it would not be politically achievable or politically pragmatic, I consider that, with a good argument based in human rights principles and leaning on overseas developments in recent years, such a change could be possible.

Entrench the New Zealand Bill of Rights Act 1990

As we saw in Chapter 6, it was the original intention that the New Zealand Bill of Rights Act should be entrenched legislation.

With some 20 years since the passing of that Act, consideration should be given to the possibility of entrenching the legislation and making it supreme law. This would enable more than the existing Declarations of Inconsistency under the Human Rights Act 1993, it would enable legislation to be declared invalid, or 'struck down'.

Declaration of Inconsistency – The Marriage Act 1955

In placing the marriage issue before the courts anew, it is important to maximise the benefit of the changes to the Human Rights Act 1993 which have enabled the Human Rights Review Tribunal and the courts, should the matter be appealed from the Tribunal, to issue a Declaration of Inconsistency.¹⁰

¹⁰ Application under the Human Rights Act 1993: Part 1A which would, if successful, lead to a Declaration of Inconsistency in accordance with the Human Rights Act s.92J.

A well-crafted submission will ensure the transfer of the onus back to the Crown to demonstrate a lawful and objective justification for denying access by same-sex couples to marriage.¹¹

However, even success in obtaining a Declaration of Inconsistency will not resolve the issue for us. Because our human rights legislation is not supreme, such Declarations do not serve to strike down legislation that is non-compliant with human rights legislation. The result of this will be, therefore, that the issue will need to be placed before the Legislature.

Although Parliament is supreme in the making of laws in New Zealand, and, technically, is able to legislate in the face of a Declaration of Inconsistency, the message that we would be able to take with us from the courts to the Legislature would be very strong. This message must be that, although the Judiciary defers to Parliament with regard to the making of the law, the Judiciary has autonomous jurisdiction to interpret the laws of Parliament. Under those laws, it is our view, and it would be with this that we seek to persuade the courts, the principle which Parliament has itself propounded mandates that, notwithstanding the Civil Union Act 2004:

- the current exclusion of same-sex couples from the ambit of the Marriage Act 1955 is discriminatory; and
- same-sex couples must be included within the ambit of the Marriage Act 1955 in order to eliminate that current discrimination.

Declaration of Inconsistency – The Adoption Act 1955

In parallel with any action seeking a declaration of inconsistency in relation to the Marriage Act 1955, it would be worth seeking a declaration of inconsistency in relation to the Adoption Act also.

Although this is a discrete issue, it is an issue closely related to marriage (with only married spouses being eligible to file a joint application for adoption currently).

¹¹ Using the standard laid down by the New Zealand Bill of Rights Act 1990 s.5.

To establish that a couple is being discriminated against because they need to be married in order to jointly apply to adopt, and yet they are not able to marry because they are in a same-sex relationship, must serve to emphasise the inadequacy of the laws in question.

Overseas marriages

Another issue that we must place before the courts relates to the validity of same-sex marriages solemnised in jurisdictions where such marriages are legally valid and in accordance with the marriage laws of those jurisdictions.¹² There are New Zealand same-sex couples who have married overseas and how have marriage certificates that prove that they are partners to a legally valid marriage. It is assumed that New Zealand would recognise the marriage as being legally valid in the country in which it was solemnised. However, whether or not that marriage is recognised by New Zealand as being legally valid in New Zealand has not yet been tested.

It is possible to apply for a Declaration of Validity by way of an application to the Family Court in New Zealand in accordance with the Family Proceedings Act 1980: s.27. It should be noted that, in this instance, the Family Court has an unfettered discretion to refuse to make any such declaration and has no accompanying obligation to explain that refusal.

It is also possible to apply for a Declaration of validity though the High Court in accordance with the Declaratory Judgments Act 1908: s.3.

It is my view that, if we take into account the matters raised in Chapter 9, with regard to the anomalies that arise with regard to cross-jurisdictional recognition, and consider seriously the overarching principle of comity of laws, particular of marriage laws, a good case can be made for recognition.

¹² Same-sex couples from new Zealand can, for example, enter into a valid legal marriage in Canada. The question then becomes whether that marriage is legally valid in New Zealand in the same way that a different-sex marriage would be.

Overseas marriages – New Zealand entitlements

It would be possible for a New Zealand same-sex couple who has married overseas to test the validity of their marriage in New Zealand by seeking access to an entitlement associated with marriage. A prime candidate for this test would be for such a couple to seek to adopt in New Zealand, relying on the fact that they are legally married overseas and are therefore spouses in accordance with the requirements of the Adoption Act 1955.

Once again, I consider that a well-argued case based in human rights principles and leaning on developments overseas, would have a significant chance of success.

CHANGES TO INCREASE THE CHANCES OF SUCCESS**Declarations of inconsistency**

Perhaps the most significant aspect of the Human Rights Amendment Act 2001 was the introduction into the Human Rights Act 1993 of a procedure for making complaints against legislation that is alleged to be discriminatory. Under Part 1A of the Human Rights Act, individuals may seek a Declaration of Inconsistency in relation to existing legislation.

To date, the issue of whether or not the Marriage Act 1955 is consistent with the Human Rights Act 1955 has not been placed before the courts under this provision. It is possible that, notwithstanding Quilter, this avenue could now be used to test the status of the Marriage Act.

In essence, as discussed above, the Quilter case was not about the issue of discrimination. The issue in Quilter was whether or not the High Court could issue a declaration, as requested by the couples, that same-sex couples were able to marry under the provisions of the existing Marriage Act 1955.

A Part 1A case would focus on the issue of discrimination,¹³ and would focus on whether, by being denied access to the Marriage Act 1955, same-sex couples are being treated unfairly without reasonable and lawful justification.

If such an application were to be successful, a very strong message would be sent to Parliament about which direction it would need to take with regard to amending the Marriage Act.

Separation of civil-legal marriage and religious marriage

One of the key factors inhibiting our progress towards marriage for same-sex couples is the inability of some to separate civil-legal marriage from sacramental marriage.

As same-sex couples, we are seeking access to the civil-legal institution of marriage. I have no concern over whether or not I am able to marry in a church – that concern is the concern of the churches themselves.

It is worth noting that the Roman Catholic Church currently has the ability to decline to celebrate the marriage of a couple who openly declare that they do not intend to have children – because this is contrary to the tenets of their religion. The Catholic Church and the Church of England may also decline to celebrate the marriage of a couple where one or both have previously divorced – because divorce is contrary to the tenets of their respective religions. Personally, I have no objection to any Church declining to celebrate the marriage of a same-sex couple where that Church considers that to do so is in conflict with their religious beliefs.

Recent statistics show that fewer different-sex couples are getting married in church ceremonies.¹⁴ Increasing numbers of marriages are occurring in non-religious settings whether these be formal (as in ‘registry offices’ weddings) or informal settings (such as the family garden or on the beach).

¹³ Under the Human Rights Act 1993 Part 1A, an application made be made to the Human Rights Review Tribunal for a Declaration of Inconsistency – essentially, a declaration from the Tribunal that a particular statute is discriminatory and is inconsistent with New Zealand’s human rights legislation.

¹⁴ In 2002-2003, 35 per cent of marriages were conducted in churches, 18 per cent in a registry office, and 47 per cent were civil services.

In France, for example, couples have a civil-legal marriage at the local town hall. It is this ceremony that confers upon them the status of marriage in the eyes of the law and the community at large. The couple may then choose to have this marriage blessed by ceremony at the church. It is this ceremony that confers upon them the status of marriage in the eyes of the Church. It is interesting to note that Prince Charles and Lady Camilla Parker-Bowles, in effect, also married in a civil-legal ceremony at the Guildhall in Windsor (the ‘actual’ marriage) that was followed by a separate religious ceremony at Windsor Chapel (the blessing).

Essentially, in New Zealand, a couple has had the ability to make the same choice. However, when the couple has chosen to have a Church wedding the two ceremonies – the civil-legal and the religious – occur simultaneously. The Minister conducts the civil-legal components of the marriage as an accredited marriage celebrant by law, and conducts the religious components of the marriage as a Minister of the Church.

The emphasis here is that we are not seeking to undermine the religious marriage ceremony or any specific church’s right to step aside from marrying same-sex couples. We respect their right, on religious grounds, to disengage themselves from this process.

However, we seek access to civil-legal marriage and ask that those religions respect our right, on religious grounds, to engage ourselves in this process.¹⁵

To me, this is perhaps the key issue facing us at present. It is not the idea of recognising same-sex couples and extending relationship protections and benefits to them that will stop us from attaining access to marriage. It is the “baggage” that goes with the term marriage itself. So long as there is an insufficient separation between secular and religious concepts of marriage, we will have difficulty in selling the idea of same-sex couples being able to enter into marriage to some people. Clarifying this separation will assist in getting people to think about the proper legal issues – equal treatment under the law for same-sex couples – rather than the emotive issues of protecting ‘traditional’ marriage.

¹⁵ Remembering that freedom of religion, by definition, means freedom from religion.

The myth of 'traditional' marriage

In my view, there is no such thing as the one and only form of 'traditional' marriage.

The 'traditional' marriage that is generally referred to is that between husband and wife, and is that which is the foundation of the 'traditional' family.

First, this 'traditional' family is one that stems from comparatively recent times, and from a narrow cultural perspective.

The nuclear family based on the marriage relationship stems from Lord Hardwicke's Act of 1753. Prior to this there were various informal forms of marriage – "jumping the broom",¹⁶ marriages in accordance with tikanga Maori in New Zealand,¹⁷ for example.

Second, some of the key characteristics of the nuclear family have been decried for various (good) reasons. Under the early (strict) nuclear family structure, males held power over women, and older males held power over younger males. Essentially, married women were the property of their husbands, and unmarried women and children were the property of their fathers. Women and children could not own property in their own right. Women had no decision-making power within the household or within wider society. When a young woman married, her father 'gave her away' to her husband.

However, the 'traditional' face of marriage has changed – marriage, as an institution, has not remained static. To hold on to this 'traditional' institution is to hold on to a myth. Generally, marriage is much more likely to be a partnership of equals. Certainly, women are no longer seen

¹⁶ "Jumping the broom" is a tradition of African origin. The couple getting married jumps over a broom that is laid on the floor. "Jumping the Broom" is a symbol of sweeping away the old and welcoming the new, or a symbol of new beginnings, http://www.african-weddings.com/jumping_the_broom (Retrieved: 14 August 2009).

¹⁷ Marriages in accordance with tikanga Maori are centrally concerned with whakapapa (genealogy). The marriage ceremony essentially consisted of a process along the lines of the following: a hui (gathering) of the relatives of each party to the marriage including a recitation of the whakapapa of both parties to the marriage, a tohunga (Priest) "repeats a prayer or invocation over the twain to preserve them in health and prosperity", a kai kotore (marriage feast) and a whakangahau (celebration) were held, after which the 'bride' and 'groom' slept together for the first time in the wharemoae (sleeping house),

as the property of their husbands but are contributors to the intangibles of the marriage (the relationship and the family), and the tangibles of the marriage (the relationship assets).

Thirdly, even if the ‘traditional’ concept of family were to have been adopted (in the ‘Hyde and Hyde’ sense)¹⁸ it has long since been broken down:

- Civil-legal marriage is not for life – divorce is available.
- Civil-legal marriage is not dissolved if the exclusivity is broken. And, with the availability of divorce, one person may legally have more than one partner in marriage during their lifetime – serial monogamy.

Different-sex couples do not have a monopoly on monogamy. I am aware of many different-sex couples who have not remained faithful to their husband, wife or partner. Conversely, I am aware of many same-sex relationships where the partners have been unfailingly monogamous.

Different-sex couples do not have a monopoly on enduring relationships. Currently, about one-third of New Zealand (different-sex) marriages end in divorce.¹⁹ Conversely, I am aware of many same-sex relationships where the partners have been together (in monogamous relationships) for more than 10 years – some extending to 40 years plus.²⁰

If tradition, in and of itself, were sufficient justification, slavery could be justified, as could be the subservience of women in marital relationships, the inability of women to vote, and interracial marriages would still be outlawed (in the United States of America, at least).

http://rsnz.natlib.govt.nz/volume/rsnz_36/rsnz_36_00_000280.pdf, (Retrieved: 14 August 2009).

18 “... the voluntary union of one man and one woman to the exclusion of all others for life”.

19 In 2002, there were 20,690 marriages and 10,292 orders for dissolution of marriage. About one quarter of the dissolutions were for couples who had been married for between 5 and 9 years. Almost one-third of couples who married in 1977 had divorced (note, not merely separated) before they reached their 25th wedding anniversary in 2002: Statistics New Zealand, “Marriage and Divorce”, <http://www.stats.govt.nz/analytical-reports/dem-trends-03/dem-trends-2003-part-3-marriage-and-divorce.htm> (Retrieved: 26 January 2006).

20 It must be remembered also that relationships longer than 20 years in duration extend back before the days of the Homosexual Law Reform Act 1986 to a time when the partners faced a much less friendly, and often rather hostile, social climate.

In relation to marriage, an adherence to tradition would not allow for divorce, and the law would retain severe penalties for adultery. Adherence to tradition is not a demonstrable justification for the exclusion of same-sex couples from marriage.

There needs to be an understanding that the fact that a particular action or state of affairs has traditionally been the case is not a sufficient justification for that action or state of affairs to continue.

Religious belief

The fact that some (or even many) people experience personal discomfort with the notion of homosexuality on the basis of their religious beliefs, is not sufficient reason to deny access to marriage for same-sex couples. Firstly, gays and lesbians have the right to hold their own religious beliefs. Secondly, freedom of religious belief means the right to hold any religious belief including no religious belief.

In the civil-legal sense, New Zealand is a secular society. The impacts of this are two-fold also. Firstly, no one religious belief has a prevailing status over another. Secondly, society at large cannot be bound by the religious beliefs of any one religion or any grouping of religions. The right to freedom of religious expression, by definition, includes the right to freedom from the religious expression of others.

I suggest that most gays and lesbians would fight for the right of any New Zealander to hold and express their disagreement with access to marriage for same-sex couples. At the same time, however, we expect the same right to express our views on the same issue and the protection of our civil-legal right to be freed from discrimination based on our sexual orientation.

There needs to be an understanding that, no matter how genuinely a religious belief may be held, and as much as the right of any individual to hold a particular religious belief must be respected at all times, that religious belief cannot, in New Zealand society, be a basis for the formulation of a particular law which follows the tenets of that religion.

Legitimate expectation

There are a number of signs that we should reasonably expect that our Government and our Parliament will ensure that legislation it passes, and the actions of Government, will be free from discrimination. In respect of access to marriage for same-sex couples, I would suggest that we should reasonably expect that Government and Parliament will not discriminate. The following factors give rise to, and do not negate, this notion of 'legitimate expectation'.

- The Parliament of New Zealand has acceded to the International Covenant on Civil and Political Rights – which provides that there shall be no discrimination.
- The International Covenant on Civil and Political Rights mandates that States Parties shall actively legislate to remove discrimination.
- The New Zealand Parliament has not passed any legislation to actively negate any of its obligations under the international human rights covenants to which it is a signatory.
- The New Zealand Parliament has no reservations on any of the international human rights treaties which would negate its accepted obligations in relation to prohibitions against discrimination.
- Rather, Parliament has passed the New Zealand Bill of Rights Act 1990 which proclaims that it is “An Act to affirm, protect, and promote human rights and fundamental freedoms in New Zealand, and to affirm New Zealand’s commitment to the International Covenant on Civil and Political Rights.
- Parliament has passed the Human Rights Act 1993 which, with its more recent amendments, mandates that there shall be no discrimination in New Zealand on the grounds of sexual orientation, sex (gender), or marital status (all of which are relevant in the same-sex marriage issue).
- Parliament has passed a specific amendment to the Human Rights Act 1993 enabling individuals to seek a Declaration of Inconsistency in relation to any legislation which they can show to be discriminatory.

- Contrary to the legislatures of a number of states in the USA, the New Zealand Parliament has chosen not to legislate to restrict marriage to a man and a woman only.
- Unlike the Government of Australia, New Zealand's Government has not sought to restrict same-sex couples, one or both of whom are New Zealand citizens or residents, from marrying in an overseas jurisdiction where same-sex marriage is valid and legal.

In the presence of indications from the Government and Parliament of New Zealand of its commitment to ensuring the presence of prescribed human rights standards and, in the absence of any indications from the Government or Parliament of any negation of those commitments, it is wholly reasonable that gays and lesbians in New Zealand should expect that all barriers to equal treatment will be withdrawn, and that they can expect full and equal treatment under the law.

One law for all

Members of three parties in Parliament have associated themselves with the catch-cries "One law for all" and "One standard of citizenship for all".²¹ This call has been made in the context of issues relating to the Treaty of Waitangi, and the occasional suggestions that there might be a case for a separate Maori legal system in New Zealand, or that, at least, there should be greater recognition of tikanga Maori (Maori customary lore) within the mainstream courts system.

These catch-cries have not been voiced in relation to same-sex marriage. However, I consider that the same principle can be applied validly to the marriage context. If those same MPs who advocate "one law for all" with regard to Treaty of Waitangi or race-based issues were to apply that same logic to marriage, the logical extension would be that same-sex couples would be permitted to marry (or, conversely, no couples would be permitted to marry). In the main, however, those who advocate "one law for all" in one situation are the very ones who advocate the preservation of marriage for the exclusive use of heterosexuals only.

It is not logically possible to advocate a principle and then to advocate the application of that principle on a selective basis – this makes a

²¹ National, New Zealand First, and ACT.

mockery of the term “principle”. In this instance, for example, it is not possible to have a principle of “one law for all” that applies only to “some”.

In human rights terms, it is not plausible to have anti discrimination provisions that apply to all persons, and then exercise those provisions only in relation to some of those persons.

Human rights not populist

In the latter part of the 1990s and into the first half of the 2000s, we have witnessed an increase in the call for public referenda on a range of issues. In the United States of America, for example, this has taken the form of referenda seeking a mandate to amend State constitutions to prevent the possibility of marriage by same-sex couples. The marriage case in Hawai‘i, that was successful in the courts but was subsequently denied by constitutional amendment resulting from public referendum, is a prime example.

Setting aside the standard Parliamentary Select Committee process in New Zealand, which provides an avenue for public submissions on any Bill being considered by Parliament, the first significant call for public views on the legal recognition of same-sex relationships came in the Ministry of Justice Discussion Paper “Same-Sex Couples and the Law” in 1999.²² This was the first time that Government had attempted to canvass extensively the wider population about matters affecting gays and lesbians, their relationships and their families.

Unfortunately, as a matter of principle, seeking public views on issues of human rights is fundamentally flawed. One of the key purposes of human rights legislation is to protect minority groups from majoritarian prejudice. This cannot result from an exercise which seeks to put in place the suggestions of the majority group on how they consider the minority group should be treated.

The only time this would not ring true would be when the majority group has already been persuaded that certain forms of treatment are

²² Ministry of Justice, “Same-Sex Couples And The Law”, Ministry of Justice, Wellington (1999).

acceptable and certain other forms of treatment are not acceptable. In this circumstance, there would probably be no need to seek public views as there would be no opposition to equality and no large measure of discrimination to overcome.

In other words, Parliament has gone to some length to ensure that, on paper at least, there are significant provisions in place designed to protect the rights of minority groups. It is untenable, therefore, to consider holding a public referendum to measure whether or not a majority group approves of treating a protected minority group with dignity, care and concern, respect in a manner that constitutes equality under the law.

International drivers

In 2001, The Netherlands was the first country in the world to allow equal access to marriage for same-sex couples. In 2009, there are 7 countries, and 6 States within the United States of America, that permit same-sex marriage (13 jurisdictions in all). Five of these jurisdictions have provided this equal access within the last year or so. The extent of change in those overseas jurisdictions, and the momentum that has gathered in a very short period of time, must eventually have an impact on New Zealand.

A greater adherence to international human rights laws must also influence New Zealand's future direction. Since the mid-1900s, with the initiation of international human rights laws and the subsequent development of international covenants to which New Zealand has acceded, New Zealand has accepted a raft of international human rights obligations. As the monitoring and enforcement of the international standards becomes consolidated, New Zealand may find itself under greater pressure, both domestically and internationally, to adhere to these standards.

In relation to marriage, in particular, there is a significant role for the rules of comity.²³ New Zealand is now in a position whereby its gay and lesbian citizens who are in relationships and wish to have those relationships recognised by way of marriage can travel overseas and get

²³ See earlier discussion in Chapter 3 and Chapter 8.

married. The comity of laws – especially insofar as it relates to marriage – could be vitally crucial in facilitating access to marriage for same-sex couples in New Zealand.

A FINAL WORD

As the motto of LeGaLE states, “Only equal = equal”.²⁴

In relation to the recognition of caring, loving, committed interpersonal relationships, there are only two ways in which same-sex couples can be granted full and equal treatment compared with their different-sex counterparts. The two possibilities are that:

Either same-sex couples must be provided with access to marriage under existing marriage legislation;

Or the Marriage Act 1955 must be repealed so that neither same-sex couples nor different-sex couples have access to marriage legislation.

So long as those in positions of power are unable to understand some of the most fundamental issues outlined in this thesis, we can expect the barriers to same-sex marriage to remain unjustly in place.

Conversely, at such time as logic, reason and understanding prevails, we will have reached the point where we can say, not only in theory but also in practice, that there are no impediments to same-sex marriage in New Zealand.

I return to, what for me has become, an iconic quote from Justice Thomas of the Court of Appeal in the Quilter case:²⁵

... gays and lesbians are denied access to a central social institution and the resulting status of married persons. They lose the rights and privileges, including the manifold legal consequences which marriage conveys. They are denied a basic civil right in that freedom to marry is rightly regarded as a basic civil right. They lose the opportunity to choose the partner of their choice as a marriage partner, many again viewing the right to choose as a basic civil right of all citizens. In a real sense, gays and lesbians are effectively excluded from full membership of society.

²⁴ LeGaLE is a group formed by the author with a focus on equal access to marriage for same-sex couples, and in interest in other legal issues affecting same-sex couples.

²⁵ Quilter v Attorney-General [1998] 1 NZLR 523: 537 (per Thomas J).

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